Petition

81-203

NO.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

TEODORO ARIZA-IBARRA and
ALVARO RODRIGUEZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

WHETHER, WHEN THE GOVERNMENT ENGAGES IN EGREGIOUS MISCONDUCT AFFECTING THE AVAILABILITY OF A MATERIAL WITNESS, AN EVALUATION OF PREJUDICE TO THE DEFENDANT CAN BE MADE WITHOUT A HEARING TO DETERMINE WHETHER THE GOVERNMENT WOULD HAVE BEEN ABLE TO LOCATE THE WITNESS, HAD IT NOT ENGAGED IN MISCONDUCT, AND WHETHER THE WITNESS' TESTIMONY WOULD HAVE BEEN HELPFUL TO THE DEFENSE.

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The petitioners, Teodoro Ariza-Ibarra and Alvaro-Rodriguez, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on May 13, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit here sought to be reviewed, affirming petitioners' convictions following the second trial, is not officially reported and is attached as Appendix "A." The first opinion of the Court of Appeals, reversing petitioners' con-

victions and ordering a new trial, is reported at 605 F.2d 1216, and is attached as Appendix "B." The memorandum and order of the Court of Appeals denying rehearing is not officially reported and is attached as Appendix "D."

JURISDICTION

The judgment of the Court of Appeals for the First Circuit, affirming petitioners' convictions, was entered on May 13, 1981. A timely petition for rehearing *en banc* was denied by the panel on June 5, 1981, and by the Court on June 12, 1981. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On February 2, 1978, petitioners Ariza-Ibarra and Alvaro Rodriguez were indicted, with Oswaldo Iglesia and Pablo Fernandez, for conspiracy to import 50,000 pounds of marijuana and 25 kilos of cocaine from Colombia into the United States. Petitioners were initially brought to trial in the United States District Court for the District of Puerto Rico in April of 1978, which trial resulted in a judgment of conviction against both petitioners on May 18, 1978. Petitioners appealed to the Court of Appeals for the First Circuit, who, on September 20, 1979, reversed the judgment against them and remanded the case for a new trial,

based on its finding that the district court had erred in permitting the prosecution to introduce evidence and make an issue at trial of the informant's past identifications and reliability. *United States v. Ariza-Ibarra,* 605 F.2d 1216, 1222 (1st Cir. 1979). In its decision, the Court of Appeals questioned the government's intentions and capabilities under *Roviaro v. United States,* 353 U.S. 53 (1957), in view of the government's representation at oral argument that it had "an understanding with the informant that he would not have to testify at trial." *Ariza-Ibarra,* 605 F.2d at 1219-1220 n.3. Nevertheless, when petitioners were brought to trial in December of 1979, which resulted in a judgment of conviction on February 1, 1980, the government again failed to provide accurate information regarding the whereabouts of its informant.

In both trials, the prosecution's case was based primarily on the testimony of Fortunato Jorge, a Drug Enforcement Administration (DEA) agent stationed in Puerto Rico, and his description of the investigation of the petitioners undertaken by himself and an informant named Alberto Larain Maestre ("Larain") (2a-3a).* Based on information provided by Larain, Larain and Jorge conducted a series of taped, telephone conversations with petitioner Ariza and others, during which Larain sought to set up future meetings. None of the taped conversations contained any discussion of narcotics, and thus "the tapes by themselves were ambivalent" as to the nature of the business transactions to be undertaken. *Ariza-Ibarra,* 605 F.2d at 1219.

Thus, Jorge's testimony concerning three subsequent, face-to-face meetings between himself, Larain and the petitioners constituted the major portion of the government's case. According to Jorge, the petitioners agreed to supply cocaine and marijuana in these face-to-face meetings. None of these meetings were recorded, and the government did not call the informant as a witness in

*Numerical references followed by the letters a-e refer to the appendices to this petition. Numerical references preceded by Tr. refer to the transcript of the second trial, which commenced on December 10, 1979.

either trial (3a). The balance of the prosecution's evidence was circumstantial, and included $5,000,000 in cashier's checks found on petitioner Ariza at the time of his arrest. (See 3a, n.1). The petitioners were arrested before any transaction occurred, and they were not found to be in possession of any drugs. *Ariza-Ibarra,* 605 F.2d at 1219.

The defense case consisted of five witnesses who were familiar with petitioners' business interests. These witnesses supported petitioners' contention that they were engaged in coffee exporting involving large sums of capital and several vessels and that the purpose of their meetings with Larain and Jorge was to further the coffee trade and not the selling of marijuana and cocaine. The defense proved that petitioner Ariza was a wealthy Colombian coffee grower, who exported coffee to Aruba and imported farm equipment from the United States (Tr. 26-27, 908-12, 929, 965-69). Petitioner Rodriguez proved that he was a legitimate boat merchant who was involved in the repair and resale of used boats, and, along with his wife, was associated with a well-known marina (Tr. 946-50, 1012-14). Petitioners' defense was that Larain, having learned of Ariza's wealth, had framed Ariza with the expectation of seizing some of his money, either through moiety claims against property lawfully taken from Ariza at the time of his arrest, or by stealing some of the cash that Ariza brought with him to Puerto Rico (Tr. 341-42). In support of this defense, petitioners attempted to show that a substantial amount of money belonging to Ariza was stolen just prior to his arrest and that Larain and Jorge knew of Ariza's coffee business, and knew that he often carried large sums of cash (Tr. 641-42, 714, 981-82).

PROCEEDINGS BELOW CONCERNING THE UNAVAILABILITY OF THE INFORMANT

Following the reversal of the petitioners' convictions by the First Circuit, a pretrial conference was held before the magistrate on November 21, 1979, at which defense counsel requested the opportunity to interview the informant with a view to calling him as a witness (4a; Tr. 304, 1035). In his subsequent memorandum, the magistrate reported that the government agreed, at the conference, to "inform the defendants, by not later than November 29, 1979, [of] the present status of the informant" (4a). Although petitioners sought compliance with this directive by letter dated December 3, 1979, the government failed to furnish petitioners with any information concerning the whereabouts of Larain prior to the commencement of the second trial on December 10, 1979 (5a).

On December 10, after impanelling a jury, a hearing was held in response to a defense request for the whereabouts of the informant. Testimony was taken to determine the availability of the informant and whether the defense would be entitled to either his current whereabouts or government assistance in securing his presence (Tr. 44, 172-73, 303). On the second day of the hearing, the government provided petitioners with documents which stated that Larain had been deactivated and he and his family had been relocated to the United States (Tr. 5-6, 130-31, 135, 232, 308). These documents were later contradicted by testimony from government witnesses which revealed that government agents had had contacts with the informant, in Puerto Rico, subsequent to his deactivation and relocation (Tr. 6-7, 11-13, 28-29, 135-37, 267-68, 270-72, 1051, 1057).

During the hearing, the government relied exclusively on Jorge to provide the court with information regarding the informant's whereabouts. Jorge indicated that he had

seen the informant, two and one half months prior to the hearing, at a coffee shop near the courthouse (7a, Tr. 129). However, the last address he had for Larain was where the informant resided during the first trial. Jorge revealed that prior to the hearing, he had made only one telephone call to this old address, which revealed that the informant no longer lived there (Tr. 7, 129, 232). Furthermore, Jorge testified that although he had been asked about Larain's availability by an Assistant United States Attorney prior to the second trial, he had never been requested to locate the informant (7a; Tr. 234). Finally, Jorge indicated that to his knowledge, Larain had never testified for the government in any of the cases on which he had worked and that Larain had been told that "the government would avoid depending on him in its cases" (7a; Tr. 223, 226, 232).

The defense called Jorge's supervisor, who admitted that he had had a chance encounter with the informant three to four months before the commencement of the second trial in the lobby of a local hotel. However, the supervisor testified that at this meeting, he did not attempt to determine where Larain was living or working (7a-8a; Tr. 267-68).

In response to a request by defense counsel that the government produce Larain, since his current whereabouts were unknown to the defense, the court ruled that "[the defense] can see [Larain], and if the government has any knowledge as to where he is they will make it available . . . " (9a). The Assistant United States Attorney replied by stating that "my agent [will] continue to find out where he is . . . [T]he government is aware of its continuing duty, if they find out where he is, to inform counsel for the defense" (10a; Tr. 313).

Despite the Assistant United States Attorney's pretrial representation, at trial five days later, Jorge testified that "I have no need to locate [Larain]. Nobody has told

me that I have to locate him or even try" (10a; Tr. 708). Immediately after the completion of Jorge's testimony, the Assistant United States Attorney revealed that he had learned that Larain had operated a local nightclub at the hotel where Jorge's supervisor had met him (11a; Tr. 1045). Thereafter, the defense called the supervisor who testified that Larain had informed him, during their chance encounter at the hotel, that he operated a nightly show there (11a; Tr. 1057). This hotel happened to be the place where defense counsel was staying throughout the trial. However, the supervisor offered no explanation for having withheld this information after the Magistrate's conference and during his testimony at the pre-trial hearing.

Although the Assistant U.S. Attorney's revelation occurred on the last day of testimony, and just prior to summation, counsel requested a picture of the informant to assist them in locating him. After the government provided counsel with the informant's high school yearbook picture, the court gave the defense the evening to locate Larain (11a-12a; Tr. 1046-47, 1088).

On the following day, prior to summation, counsel informed the court that after learning that Larain was no longer associated with the nightclub, they were able to trace the informant's whereabouts to a restaurant which he was known to frequent. After waiting two or three hours, during which the informant did not appear, counsel returned to their hotel. Emphasizing that they were able to acquire this information in less than an hour, counsel argued that the success of their investigation was further proof that the government had made no real effort to locate Larain, despite their knowledge of his connection with the hotel (13a). Counsel reiterated that the government had withheld this connection from the defense (13a; Tr. 267-68).

On appeal to the First Circuit, petitioners argued 1) that the district court committed reversible error when, after finding that the informant was a material witness whose whereabouts were presently unknown, it failed to require the government's exercise of reasonable diligence to locate Larain, and 2) that the government's misrepresentation and withholding of information concerning the informant's whereabouts and its complicity with his unavailability violated their right to due process.

In its opinion dated May 13, 1981, the Court of Appeals found that the petitioners had made a proper and timely request for the informant's whereabouts (15a). Furthermore, the court found that the government did not satisfy its *Roviaro* obligations by "the bare furnishing of a name and non-usable address" (16a). In addition, the court found that the government's single call to the informant's former address did not constitute a diligent effort to locate him and consequently that the government had failed to exercise "diligence reasonable under the circumstances" (17a). Finally, the court concluded that when the government breached its obligation to promptly respond to the petitioners' request for information and "to supply the defendant with all information that might reasonably be helpful in the search." the government had engaged in "misconduct affecting the availability of a witness" (21a-23a).

Accordingly, the court found that its application of the principles enunciated in *Roviaro* would have compelled reversal of petitioner's convictions (17a). However, a divided panel indicated that it would not reverse because the petitioners had failed to make 1) a showing that "with some diligence," after having been provided with the informant's last known address at the hearing and his connection with the local hotel on the last day of testimony, "defense counsel could not have located the informant" and 2) a showing "that Larain's testimony would be

helpful to [petitioners'] case" (19a). The majority based its decision to require such a showing of petitioners on speculation that the defense did not want "to obtain Larain's testimony but to obtain a tactical advantage at trial and on appeal from his absence" (18a). On the basis of petitioners' failure to make these showings, the majority concluded that "no prejudice to the [petitioners] resulted from the government's misconduct in this case" (23a).

Judge Bownes, in his dissent, agreed with the majority's recitation of the facts. However, he stated that "a fair reading of the majority opinion can lead to but one conclusion: the Government behaved egregiously" (27a). The government's "deceitful and improper conduct," coupled with its "failure to satisfy the mandate of *Roviaro,*" moved Judge Bownes to conclude that the indictment should be dismissed (27a, 28a, 30a). As to the majority's conclusion that the petitioners had failed to show prejudice because they had not made a diligent search for the informant and had not shown how his testimony would be helpful, Judge Bownes noted that "speculation [that the defense was not seriously interested in searching for Larain, but rather sought grounds for reversible error] is an uncertain enterprise," and he questioned how the defense was to make a proper offer of proof when "they were deprived of the opportunity to interview the informant" (29a n.1). Finally, Judge Bownes argued that "the critical question is how the Government acted" (29a).

Thereafter, petitioners filed a petition for rehearing, with a suggestion for rehearing *en banc.* In their petition, petitioners argued that this Court's decision in *Roviaro* did not require the accused to affirmatively demonstrate how the informant's testimony would have been helpful to his case to justify reversal for the government's failure to comply with the *Roviaro* mandate. Rather this Court looked to the materiality of the informant's testimony as

determined by whether the informant's "possible testimony" was relevant and *"might have been* helpful to the defense." *Roviaro,* 353 U.S. at 64 (emphasis supplied). Consequently, the petitioners contended that the Court of Appeals, in requiring petitioners to make a showing that the government had suppressed *favorable* evidence, was in conflict with *Roviaro* and its progeny in the First Circuit. The petitioners urged the court to fashion a remedy consistent with the government's conduct and the particular circumstances of the case and suggested that the case be remanded for an evidentiary hearing in order to provide a factual basis for a determination of prejudice.

The panel denied the petition for rehearing on June 5, 1981. In its memorandum, the panel reiterated that the basis for its refusal to reverse petitioners' convictions was its conclusion that petitioners had not established prejudice because they had failed to show that *they* could not have located the informant at the time of the second trial (2c). Petitioners' request for rehearing *en banc* was denied by the court on June 12, 1981.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH DECISIONS OF THE THIRD, FIFTH, EIGHTH AND NINTH CIRCUITS CONCERNING THE PROPER IMPLEMENTATION OF THIS COURT'S DECISION IN *ROVIARO v. UNITED STATES*, 353 U.S. 53 (1957).

In *Roviaro v. United States*, 353 U.S. at 60, this Court held that "the fundamental requirements of fairness" placed certain limitations on the evidentiary rule which permits the government to withhold the identity of an informer. Specifically, this Court ruled that the "informer's privilege" must give way "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* at 60-61. This Court concluded that when the informant's possible testimony is found to be material to the offense charged, the government must supply his name and address "or suffer dismissal." *Id.* at 62-63, 65 n. 15. After weighing the circumstances presented by the case, the Court concluded that the informant's possible testimony was relevant and "might have been helpful to the defense." *Id.* at 63-64. This Court reached this decision in the absence of any affirmative showing by the petitioner that "he was harmed by the nondisclosure" or any offer of proof concerning the defense to which the informant's testimony would be essential. *Id. at 69-71 (Clark, J., dissenting).*

Applying the principles enunciated in *Roviaro* to the circumstances of this case, the First Circuit refused to reverse the petitioners' convictions, because the petitioners

had failed to prove that the informant was unavailable and that his testimony would be helpful to the defense (17a-19a; 2d). The First Circuit's implementation of *Roviaro* in the situation where the prosecutor fails to ascertain the current whereabouts of his informant stands in sharp conflict with the decisions of four other circuits. In *Velarde-Villarreal v. United States,* 354 F.2d 9, 13 (9th Cir. 1965), the Ninth Circuit interpreted *Roviaro* to mean that an accused should not be "denied access to . . . an informer through any action of the United States." Therefore, the court held that if the government could have produced the informant through reasonable effort, but failed to do so when the defendant demanded production, a new trial was required. *Id.* at 12. Consequently, the court remanded the case for a hearing at which the burden was on the government to demonstrate that "it was genuinely unable through reasonable efforts to produce" the informant and that it had in no way caused the witness to be or become unavailable. *Id.* at 13. In a subsequent case, where the informant told a government agent that he did not want to testify and the court found that the government made no attempt "to persuade or direct him otherwise or to condition his continued employment upon his availability as a witness when needed," the Ninth Circuit held that the informant's unavailability at trial required a reversal. *United States v. Leon,* 487 F.2d 389, 392-93 (9th Cir. 1973), *cert. denied,* 417 U.S. 933 (1974).

The Eighth Circuit has taken a similar position with respect to the government's obligations under *Roviaro* and the appropriate remedy for their violation. In *United States v. Barnes,* 486 F.2d 776, 780 (8th Cir. 1973), the Court delineated the government's obligation as a duty to make "every reasonable effort to have the informant made available to the defendant to interview or use as a witness, if desired." This duty required the government, if it did not intend to use the informant as a witness, to

disclose the informant's name and address prior to trial or to at least make a reasonable effort to locate him. *Id.* at 779-80. If the government failed to make the proper disclosure and did not produce the informant at trial, the Eighth Circuit held that an evidentiary hearing was required to determine 1) whether the government was genuinely unable through reasonable efforts to produce the informant and had not caused him to become unavailable and 2) whether the informant possessed any exculpatory evidence which "in any way detracted from the credibility of the government's proof . . . " *United States v. Kitchen,* 488 F.2d 572, 573, 575 (8th Cir. 1973). *See United States v. Norton,* 504 F.2d 342, 345 (8th Cir. 1974), *cert. denied,* 419 U.S. 1113 (1975).

The Fifth Circuit has also required an evidentiary hearing to weigh prejudice in a case where the informants were unavailable at trial because government agents had, prior to trial, assisted them in leaving the state. *Lockett v. Blackburn,* 571 F.2d 309, 312-13 (5th Cir.), *cert. denied,* 439 U.S. 873 (1978). Having concluded that the government made no effort to find the informants, the court remanded the case for an evidentiary hearing to determine whether the informant's unavailability prejudiced the defendant. *Id.* at 314. At that hearing, the informant's testimony was to be evaluated against the standard of materiality for physical evidence for which a specific request has been made, set forth by this Court in *United States v. Agurs,* 427 U.S. 97, 104-06 (1976). The Fifth Circuit asserted that application of the *Agurs* standard was appropriate because "[i]t should make no difference that [the defendant] requested witnesses rather than physical evidence." *Lockett,* 571 F.2d at 314 n. 7.

Finally, the Third Circuit adopted the *Barnes* standard for evaluating the government's conduct in *United States v. Jones,* 492 F.2d 239 (3d Cir. 1974), a case whose facts bear a marked similarity to those of the case at bar.

The government in that case made no effort to find the informant prior to trial, apart from a few "casual inquiries." *Id.* at 242. When the informant's last known address was disclosed during testimony at trial, defense counsel was forced to undertake a fruitless, last minute search for the missing informant. The court found that the burden imposed on the defense by such a search, during trial, in combination with the government's failure to meet its *Roviaro* obligations prior to trial, was so prejudicial as to require a new trial. *Id.*

Thus the decision below is in conflict with the decisions of four other circuits, with the consequence that a defendant's rights under *Roviaro* will vary greatly depending on the circuit in which he is tried. Certiorari should be granted to clarify the proper implementation of the *Roviaro* principles and to settle the inter-circuit conflict.

II

THE DECISION BELOW UNDERMINES THE PRINCIPLES ESTABLISHED BY THIS COURT IN *ROVIARO V. UNITED STATES* AND RAISES A SIGNIFICANT AND RECURRING ISSUE CONCERNING THE APPROPRIATE REMEDY FOR GOVERNMENT INTERFERENCE WITH AN ACCUSED'S RIGHT TO PRESENT A DEFENSE.

This Court has, on a number of occasions, acknowledged that an accused has a right to present a defense which is implicated in the guarantee of a fair trial. In *Roviaro,* this Court made it clear that the government's privilege to withhold information concerning its informant was limited by the "fundamental requirements of fairness" when disclosure would be "helpful to the defense of the accused." 353 U.S. at 60-61. This Court required that the public interest in the flow of information

to law enforcement officials be balanced against "the individual's right to prepare a defense." *Id.* at 62. In *Brady v. Maryland,* 373 U.S. 83 (1963), this Court held that the government's actions in suppressing exculpatory materials known to it, but not known to the defendant, violated the same due process rights to present a defense as those implicated in *Roviaro.* See *Chambers v. Mississippi,* 410 U.S 284 (1973) and *Washington v. Texas,* 388 U.S. 14 (1967), wherein this Court held that state evidence rules which precluded the defendant from eliciting relevant and material testimony violated the defendant's right to present a defense, recognized as "a fundamental element of due process of law." 388 U.S. at 19. Implicit in these cases is the principle enunciated by this Court in *Williams v. Florida,* 399 U.S. 78, 82 (1970), that a criminal trial is essentially a search for the truth and that "this search is not furthered by rules which turn the trial into a mere 'poker game' to be won by the most skilled tactician."

The First Circuit's decision below has a direct impact on the basic right to present a defense and serves to undermine the protections afforded that right by this Court's decisions. In essence, the First Circuit's holding requires the defendant to prove prejudice, without first requiring the government to demonstrate that it could not have found the informant, had it not engaged in misconduct, and to produce the informant for a hearing to determine whether his testimony would have been helpful to the defense. This holding permits the government to either actively assist or passively allow the informant to become unavailable and then claim, with impunity, that it does not know the informant's whereabouts. Moreover, the government can withhold key information regarding the informant's whereabouts until the last minute and then, by providing that information, shift the burden to defense counsel to locate the informant while attempting to try the case. If defense counsel is unable to or chooses not to

make a diligent effort to locate the informant during the trial or even if he does, unsuccessfully, but he is unable to make an offer of proof, without having interviewed the informant, as to how the informant's testimony would help his case, he is not prejudiced in the eyes of the First Circuit.

The consequences of such a holding are illustrated by the pattern of unchecked prosecutorial misconduct found in First Circuit cases emanating from the District of Puerto Rico. In *United States v. Davila Williams,* 496 F.2d 378, 381 (1st Cir. 1974), the government waited until trial to provide the defendant with an address at which the informer no longer resided. Although the First Circuit noted that it did not condone the government's footdragging, it concluded that there was no error since the defendant had made no attempt to demonstrate the government's lack of diligence. *Id.* at 382. In *United States v. DeJesus Boria,* 518 F.2d 368 (1st Cir. 1975), the prosecutor gave the defense what it described as the informant's last known address, and then took the position that he had no knowledge of the informant's whereabouts and had no duty to find him. *Id.* at 371. After the trial, it was revealed that the government had placed the informant on an airplane flight to Spain, before the prosecutor provided defense counsel with the purported "last known address." *Id.* Although the court questioned the propriety of the government's conduct, it held that absent a showing by the defendant "that the informer's testimony would be exculpatory or helpful," the withholding of information was not so prejudicial as to require reversal. *Id.* at 372-73.

Finally, in the instant case, the First Circuit, in deciding the petitioners' prior appeal, put the government on notice that an understanding with the informant that he would not have to testify at trial raised serious questions about the government's ability to fulfill its obligations under *Roviaro. United States v. Ariza-Ibarra,* 605 F.2d at 1219-20 n.3. Nevertheless, in the face of the First Circuit's

warning, the government maintained a studied ignorance of the informant's whereabouts, despite on-going contacts, and withheld key information that might have assisted the defense in ascertaining his location. The First Circuit's decision to affirm petitioners' convictions, in effect, condones this pattern of conduct, to the detriment of "the individual's right to prepare his defense." *Roviaro,* 353 U.S. at 62.

The number of decisions in the First Circuit alone dealing with government misconduct affecting the availability of an informant indicates the persistent nature of the issue posed by this case. The government's use of informants, particularly in the investigation of narcotics cases, is extensive. For reasons having to do with both their background and the nature of their work, informants are most reluctant to make themselves available for testimony in court. Consequently, almost every case involving an informant may present problems for the defendant who wishes to exercise his *Roviaro* right to interview the informant in preparation for trial. *Roviaro,* 353 U.S. at 64.

This Court recognized the potential for unfairness in the trial process if the government was always permitted to render the informant unavailable to the defendant, and therefore placed limitations on the government's privilege to withhold information in *Roviaro.* However, since this Court last considered this question in *Roviaro,* conflicting lines of decision have developed in a number of circuits regarding the proper implementation of *Roviaro* when the informant's whereabouts become unknown as a result of either government action or inaction. In light of the common practice of using informants and the recurrent problem of their unavailability to the defense at the time of trial, a re-examination of the government's obligations under *Roviaro* and a clarification of the appropriate remedy for the government's failure to meet those obligations should be undertaken by this Court.

Finally, the correctness of the decision below, apart from the issue of the proper standard for measuring the petitioners' prejudice, is open to serious question. In essence, the First Circuit decided the instant case in a vacuum, by assessing facts that were not in the record. The record certainly does not support the conclusion that the petitioners made no efforts to obtain information concerning the informant. As soon as the new attorneys whom petitioners retained for the second trial entered the case, they indicated a desire to interview the informant and made a request for information concerning his status. Moreover, a major portion of the hearing conducted after jury selection was devoted to the issue of the informant's unavailability. When the government finally provided defense counsel with key information regarding the informant's connection with a local hotel on the last day of testimony, defense counsel sacrificed the evening prior to summations to a fruitless search for the informant. Finally, with regard to the petitioners' failure to show that the informant's testimony would be helpful, after having been denied the opportunity to interview him, the government's misconduct, which served to impede defense efforts to locate the informant, raises at least the inference that he would not have corroborated the prosecution's case.

The effect of the First Circuit's ruling is to perpetuate government conduct which seriously impinges on a defendant's right to prepare and present a defense. The significance of this right, which inheres in the due process guarantee of a fair trial, and the division between the circuits over the proper remedy for government interference with that right, justify the grant of certiorari to review the judgment below.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1981

APPENDICES

APPENDIX "A"
SECOND OPINION OF THE UNITED STATES COURT OFAPPEALS FOR THE FIRST CIRCUIT, DECIDED ON MAY 13, 1981

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1112

UNITED STATES OF AMERICA,

APPELLEE,

v.

TEODORO ARIZA-IBARRA,

DEFENDANT-APPELLANT.

No. 80-1113

UNITED STATES OF AMERICA,

APPELLEE,

v.

ALVARO RODRIGUEZ,

DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. JUAN R. TORRUELLA, *U.S. District Judge*]

Before CAMPBELL and BOWNES, *Circuit Judges*,
and KEETON, *District Judge.**

Chester Mirsky, with whom *Franklyn Gould*, *Norman Reimer*, and *Gould & Reimer* were on brief, for appellants.

Justo Arenas, Assistant United States Attorney, with whom *Raymond L. Acosta*, United States Attorney, and *Jose Ricardo Aguayo*, Assistant United States Attorney, were on brief, for appellee.

May 13, 1981

KEETON, *District Judge.* Following a new trial ordered by this court in *United States* v. *Ariza-Ibarra*, 605 F.2d 1216 (1st Cir. 1979) ("*Ariza I*"), defendants Teodoro Ariza-Ibarra ("Ariza") and Alvaro Rodriguez ("Rodriguez") were again

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* Of the District of Massachusetts, sitting by designation.

convicted by a jury of conspiracy to import 50,000 pounds of marijuana and 25 kilos of cocaine from Colombia into the United States in violation of 21 U.S.C. §§ 952(a), 963. On this appeal, we are required to address an issue left open in *Ariza I*, 605 F.2d at 1219-20 n.3, concerning the scope of the government's duty under *Roviaro* v. *United States*, 353 U.S. 53 (1957), and *United States* v. *Davila Williams*, 496 F.2d 378 (1st Cir. 1974), to provide a defendant with accurate information concerning the whereabouts of a confidential informant.

The government's theory of the case remained the same at the second trial as in *Ariza I*:

> As portrayed by the prosecution, Ariza was a Colombia-based supplier of drugs, while Rodriguez —who dealt in vessels suitable for drug smuggling—was one of his lieutenants. Both defendants were arrested in the afternoon of January 31, 1978 at the international airport in San Juan. Their capture followed an undercover operation in which Drug Enforcement Administration (DEA) agents and an informer posed as would-be drug purchasers. Meeting with defendants on January 30 and 31, the undercover operatives made final arrangements to procure from them a shipment of Colombian cocaine, with a marijuana deal to follow. Before any part of the transaction was consummated defendants went to the airport; fearing that they were planning to depart, DEA agents arrested them. Defendants were not charged with commission of any substantive offense, but rather with the conspiracy to import that was allegedly hatched in the presence of the undercover operatives.

605 F.2d at 1218-19.

The prosecution's evidence at the second trial was in all relevant respects identical to that summarized in *Ariza I*, *id.* at 1219-20. We state only that the government's case was largely dependent on the testimony of Fortunato Jorge, the DEA

agent who, along with an informant named Alberto Larain Maestre ("Larain"), negotiated the agreement to purchase drugs from the defendants that constituted the alleged conspiracy. At trial, Jorge testified that he learned about Ariza from Larain in November 1977. Shortly thereafter, the two men began a series of telephone calls to Ariza, which were taped by Jorge and placed in evidence at trial. None of the taped conversations included any express reference to drugs. Instead, there were "[g]uarded references to 'coffee' and 'furniture' [which] could well have been cover words for other substances, and the conversations were so deliberately cryptic as to suggest illicit rather than ordinary commercial dealings." *Id.* at 1219.

In addition, Jorge testified concerning several face-to-face meetings with the defendants, at which both he and Larain were present, where an agreement was reached that Ariza, with Rodriguez' assistance, would supply the men with 25 kilos of cocaine and 50,000 pounds of marijuana. None of the face-to-face meetings with the defendants was recorded. As was true in *Ariza I*, at the second trial "[i]t was Jorge's testimony of what defendants said at the later, unrecorded, meetings that provided the government with its basic case." *Id.*[1]

Larain was not called as a witness by the government or the defense at either trial. Appellants argue that at the second trial, the government violated its duty under *Davila Williams* by failing either to furnish the defense with accurate information concerning the informant's whereabouts or to exercise reasonable diligence under the circumstances to locate him. In addition, they assert that the government deliberately

[1] The remainder of the government's evidence was circumstantial. Two witnesses testified concerning the defendants' arrest, when Ariza was found with $5,000,000 in cashier's checks in his shoe. Two other witnesses described the volume and frequency of large cash transactions in Ariza's bank account around the time the alleged conspiracy was hatched. Finally, two witnesses described modifications ordered by Rodriguez to enlarge the storage capacity of his ship, the *Wendy B.*

withheld information concerning Larain's whereabouts. Finally, appellants argue that the district court erred in denying their request for a missing witness instruction. To set the context for evaluating appellants' contentions, we describe the proceedings occurring before and during the second trial in some detail.

II.

A. Proceedings Before the Second Trial

On September 30, 1979, in *Ariza I*, this court reversed defendants' convictions and remanded the case for a new trial. On November 21, 1979, a pretrial conference was held before Magistrate Simonpietri at which an Assistant United States Attorney and Rodriguez' lawyer were present.[2] In his memorandum on the conference, dated November 27, 1979, the magistrate reported that "it was agreed that the Government will inform the defendants, by not later than November 29, 1979, [of] the present status of its informant." No transcript of the pretrial conference before the magistrate is in the record. However, the parties do not dispute that at the conference, defense counsel announced that he wished to interview Larain, and the Assistant United States Attorney responded that Larain was no longer active as an informant and that he did not know where Larain was.

On December 3, 1979 Rodriguez' attorney, who was then in New York, wrote to the prosecutor in charge of the case to discuss various pretrial matters, including Larain's whereabouts:

> In the event that you have been unable to locate Larain, we would appreciate information in this behalf and that you make it available to us. When we last appeared before the Magistrate in the instant case, you

[2] Both defendants retained new counsel for the second trial. Rodriguez' new attorney made his first appearance at a status conference on October 26, 1979. Ariza's trial counsel filed a written petition for admission on November 27, 1979.

> represented that Larain was no longer in the service of the Drug Enforcement Administration and that his whereabouts were unknown to you. If this situation has changed, we would appreciate, of course, hearing from you.

This letter was received by the U.S. Attorney's office in San Juan on December 6, 1979.

The government did not furnish the defense with any information concerning Larain's whereabouts, in response to either the magistrate's memorandum or defense counsel's letter, before December 10, 1979, the date on which the second trial commenced.

B. The *Petrozziello* Hearing

On December 10, 1979, after impaneling the jury, the district court recessed the trial and convened a hearing on the admissibility of certain statements allegedly made by two of the defendants' purported co-conspirators. *See United States* v. *Petrozziello*, 548 F.2d 20 (1st Cir. 1977).[3] The court also agreed to take up the issue of Larain's availability at the *Petrozziello* hearing.[4]

After the hearing began, the government furnished defense counsel with several documents bearing on Larain's movements during the period between the first and second trial. On the

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[3] In *United States* v. *Ciampaglia*, 628 F.2d 632, 637-38 (1st Cir. 1980), we held that a final *Petrozziello* ruling should not be made until the close of all the evidence. *See also United States* v. *Patterson*, No. 80-1213, slip op. at 9 (1st Cir. March 9, 1981). A district court remains free, however, to hold an earlier hearing for the purpose of making a conditional ruling. *See Ciampaglia*, 628 F.2d at 638 & n.3.

[4] At various times during the hearing, the district court indicated that it was hearing evidence to determine "whether [Larain] is available equally to [the defense] as to the government," and "whether [the government is] in fact withholding his present whereabouts." Because there had not yet been a formal request to produce Larain, a request for a subpoena, or a request for a missing witness instruction, the record does not make clear why the district court heard evidence on these questions at the *Petrozziello* hearing.

first day of the hearing, the prosecutor gave defense counsel a copy of a memorandum prepared by a DEA group supervisor in San Juan in September 1978, which indicated that Larain was being "deactivated," *i.e.*, removed from active informant status. The September 1978 report made reference to an April 1978 report on Larain's activities. When defense counsel requested it, the prosecutor stated that the government had not been able to locate that report. The next day, the prosecutor produced the April 1978 report, in which the DEA group supervisor described three investigations on which Larain had worked. The report indicated that "[s]ince the conclusion of the above investigations [Larain] and his family have relocated themselves in the United States."[5] The author indicated that Larain would remain on active status and maintain contact to initiate additional drug cases.

In addition, on the second day of the hearing, defendants were given copies of two DEA memoranda concerning Larain's moiety claims arising out of the case. The first memorandum, dated January 2, 1979, informed Ronald Siebert, the Special Agent-in-Charge of DEA's San Juan office, that Larain's claim for compensation with respect to the seizure of a boat belonging to Rodriguez had been granted, but that his moiety claim relating to the $5 million found on Ariza at the time of his arrest had been denied by the agency. Siebert was told to refer Larain to the Internal Revenue Service, which had seized the funds, and was instructed to have Larain sign an agreement accepting the compensation granted. The second memorandum, dated January 24, 1979, requisitioned a check for $13,080.97 to be forwarded to Larain in care of Siebert.

Agent Jorge was the government's first and only witness at the *Petrozziello* hearing. After testifying at length concerning the conspiracy between the defendants and one of the hearsay

[5] The evidence received at trial indicates that Larain had not permanently relocated in the United States. *See* pp. 11-13, *infra*.

declarants, Jorge was questioned by the government concerning Larain's whereabouts. On direct, Jorge testified that he had last worked with Larain about one year earlier, and that although he had last seen Larain about two and a half months before the day he testified at a meeting arranged by Larain at a restaurant near the Federal Courthouse in San Juan, Jorge had not asked Larain where he was living at that time.

Jorge indicated that the last address he had for Larain was an apartment in the Laguna Gardens in Carolina, Puerto Rico. Jorge stated that Larain had lived at the Laguna Gardens address before and during the first trial, and that he had furnished that address to defense counsel in the first proceeding. At the hearing, Jorge said that he had telephoned the apartment recently and was informed by a woman who answered that Larain no longer lived there.

During cross-examination, Jorge stated that Larain had never testified in any of the several cases on which the two men had worked. The defense established that although Jorge had not promised Larain that Larain would never be required to testify in a trial arising from one of his investigations, Jorge had told Larain that the government would avoid depending on him in its cases.

In addition, Jorge testified that although he had been asked by an Assistant United States Attorney whether he knew Larain's whereabouts, he had never been instructed to locate Larain. According to Jorge, the one phone call to the Laguna Gardens apartment constituted Jorge's only effort to find Larain.[6]

At the conclusion of the government's evidence, defendants called Agent Siebert on the issue of the government's knowledge of Larain's whereabouts. Siebert testified that he had last seen Larain three or four months earlier during an

[6] At the *Petrozziello* hearing, the government stipulated that Jorge's efforts to find Larain were limited to the single telephone call to the Laguna Gardens apartment.

accidental encounter in the lobby of the Condado Holiday Inn. The two men exchanged pleasantries, but Siebert did not attempt to find out where Larain was then living or working.

Siebert's testimony on what efforts the agents made to locate Larain is somewhat contradictory. At one point, he stated that Jorge's telephone call to the Laguna Gardens apartment was the only such attempt of which he was aware. Shortly thereafter, Siebert testified that he was sure Jorge had telephoned Larain's previous address "several times."

Following Siebert's testimony, the district court ruled that defense counsel had known "not only of the existence of the informant. . .[but] of the address of the informant." Then, after reading from *United States* v. *Turbide*, 558 F.2d 1053, 1060 n.6 (2d Cir.), *cert. denied*, 434 U.S. 934 (1977), ("[A] defendant who knows the informer must show that he has made a diligent attempt to locate him before relief will be ordered. . ."), the court found that in the instant case the defense had not made the showing required by *Turbide*.

In response, Rodriguez' attorney stated that current defense counsel first learned that Larain's address had been given to the previous defense attorneys during Jorge's testimony at the *Petrozziello* hearing. He stated that defendants had relied on what he characterized (erroneously, we note)[7] as a finding

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[7] Footnote 3 in *Ariza I* states:

> At one point during the trial, after defense counsel had objected to the testimony about Larain and said, "We are entitled to cross-examine that fellow," the prosecutor said, "You can subpoena him." The record shows that defense counsel then said "Where?" and that there was no response. While the government did not then produce Larain's address, as it would have been required to do under *Roviaro* v. *United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), in response to a proper request by defendant, there is no indication that the defense ever made an explicit request. At oral argument in this court, the government represented that it had an understanding with Larain that he would not have to testify at trial, a statement that raises questions as to the government's intentions and capabilities under *Roviaro*. As a new trial must be held in any event, we do not decide whether defendants' rights under *Roviaro* were in any way implicated.

Id. at 1216-17. It is apparent from the text of this footnote that this Court

of this Court in *Ariza I*, that his predecessors had not been furnished with Larain's address. At that point, the court ruled that defense counsel had not

> shown any effort that you have made to contact [Larain] and...haven't established by any evidence...that the government has in any way impeded your effort in trying to find Mr. Larain... [T]he evidence before me does not show that the government has any knowledge any more than you do as to where he is now.

After close questioning by the court, defense counsel conceded that "[t]he defense has made no efforts whatsoever to look for the government's confidential informant as far as this record is concerned."

Following a recess, defense counsel made their first request on the record that the government be ordered to produce Larain.[8] The court then asked the Assistant United States Attorney if he knew where Larain was. The prosecutor responded that he did not. Shortly thereafter, the court concluded that:

> [B]ased on the record before me, I rule that [the defense] can see [Larain], and if the government has any knowledge as to where he is they will make it available to...counsel for the defense, so they can make whatever arrangements they feel are proper.

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made no finding concerning whether the government had furnished Larain's address to defense counsel at the first trial. We note that attorneys different from defense counsel in either trial argued defendants' appeal in *Ariza I*.

We note also that although one of the defense attorneys from the first trial was seated in the courtroom during the second trial, defendants declined to call him to ask whether he had been given Larain's address during the first trial, because they stated his testimony would be ambiguous on the issue.

[8] Defendants' counsel stated that:

> It is the defendant's position that the informant...is not in the hands of the defense. We wish to speak with him. We believe that the prosecution either knows, or knew where he was; that he is in every sense...under their control, and we, at this point, still wish to speak with him...with a view, of course, to call him as a witness for the defense.
>
> And if he is not produced, we would request a missing-witness charge.

In his response the prosecutor stated that "my agent [will] continue to find out where he is. . .[T]he government is aware of its continuing duty, if they find where he is, to inform counsel for the defense."

C. The Second Trial

After the opening statements, the government called Agent Jorge as its first witness. On cross, Jorge's testimony concerning Larain was substantially similar to that given at the *Petrozziello* hearing. The agent repeated his testimony that he had told Larain that the government would not depend on his testimony, but that it could not guarantee that Larain would not be required to testify. At trial, he added that he had informed the Assistant United States Attorney of this understanding.

Jorge also repeated his prior testimony that he had made no efforts to find Larain by visiting his previous address or tracing the compensation checks. However, when pressed by defense counsel on his efforts to find Larain, Jorge stated, "I have no need to locate him. Nobody has told me that I have to locate him or even try."[9]

Immediately after his testimony was completed, Jorge was excused. None of the government's six other witnesses provided any information concerning Larain's whereabouts.

The defense called five witnesses familiar with Ariza's and Rodriguez's business interests, to testify about why Ariza would travel with large amounts of money, and why Rodriguez had ordered modifications on one of his ships. On the morning of December 19, 1979, the eighth day of the trial, the defense announced that it would call Agent Siebert to rebut Jorge's testimony concerning the government's efforts to learn of Larain's address. However, before Siebert began to

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[9] This statement is contradicted by Siebert's statement at the *Petrozziello* hearing that he had asked his agents to find Larain, by Siebert's subsequent testimony at trial that he had instructed Jorge to find the informant, and by the prosecutor's representation that his agent would "continue to find out where he is. . ."

testify, there was a prolonged sidebar conference at which defendants argued that they ought to be allowed to place before the jury evidence that the government had failed to comply with the agreement it made before the magistrate. Relying once again on *United States* v. *Turbide*, *supra*, the district court ruled that because the defendants had known of Larain since before the first trial, and had not made any effort to locate Larain, the government was under no obligation to attempt to locate him.

Shortly thereafter, the court recessed the trial for lunch. After the recess, Quiles, the Assistant United States Attorney, announced that during the break, an attorney who was visiting his office on other matters had informed the prosecutor that he had seen Larain two weeks earlier at the Condado Holiday Inn in a nightclub called the El Casanova Lounge. According to the attorney, Larain owned the nightclub, and was using his own name. The prosecutor furnished defense counsel with this information and learned from them that they were also staying at the Condado Holiday Inn. Defense counsel then requested a picture of Larain. After the prosecutor offered to provide the most recent photograph of the informant he could find,[10] the court asked defense counsel, "Does that satisfy you?" Ariza's attorney responded, "Certainly, Judge, we have all we can get."

The defense then called Agent Siebert. The agent's testimony at the trial differed from that given at the *Petrozziello* hearing in two significant respects. First, at trial Siebert testified that he knew Larain had had a nightly show at the Condado Holiday Inn that had disbanded within the past six months. Second, the agent stated that during their accidental encounter at the Holiday Inn, Larain had stated that he was then working at the hotel.

[10] Quiles said he would check the government's files for a current picture of the informant. The prosecutor also revealed that he and Larain had attended high school together and offered to give defense counsel the picture of Larain contained in his high school yearbook.

In addition, Siebert was questioned concerning the government's efforts to find Larain. Contradicting Jorge's testimony, Siebert stated that about two months earlier, he had instructed Jorge to find the informant. Siebert indicated that Jorge told him that the agent had telephoned Larain's apartment numerous times and "tried" the Holiday Inn as well.

Shortly thereafter, during a brief sidebar conference, the prosecutor stated that after receiving a copy of *Ariza I*, he called Siebert and asked him to determine Larain's whereabouts. Defense counsel again pressed Siebert on what efforts Jorge had made to find Larain. In addition to the telephone calls, Siebert stated that Agent Jorge had told him that he had visited Larain's former apartment and talked with a guard.[11]

The last witness for the defense was Justo Arenas, the Assistant United States Attorney who argued on behalf of the government in *Ariza I*.[12] At the conclusion of Arenas' testimony, the court recessed the trial, informing defense counsel, "I am going to give you the opportunity to search for this gentleman tonight in the same place...where you are staying."

At the opening of trial the next day, defense counsel informed the court that they had gone to the Condado Holiday Inn to look for Larain the previous evening. They reported that a person at the desk had told them that Larain had managed a nightclub at the Inn. At the nightclub, the attorneys were informed that Larain had not been connected with the establish-

[11] Siebert's testimony on this subject conflicts with Jorge's testimony that no one had told him to find Larain, that he had not done anything to find the informant other than once calling the Laguna Gardens apartment, and the government's stipulation to the same effect.

[12] At oral argument on that appeal, Arenas represented that the government had an understanding with Larain that the informant would not have to testify at trial. *See Ariza I*, 605 F.2d at 1219-20 n.3 and n.7, *supra*. At the second trial, Arenas testified that he had an impression that there was an agreement that Larain would not have to testify, but that his impression was not based upon any statement made by Jorge or any other DEA agent or by any member of the U.S. Attorney's Office.

ment for some months. Counsel then talked to employees of the hotel's restaurant, who suggested they go to a restaurant called the Don Pepe. At the Don Pepe, the attorneys were told that Larain usually visited the restaurant three or four times each week and had been there during the previous week. Defense counsel informed the court that they waited at the Don Pepe for "two or three hours," and Larain did not appear.

The defendants did not move for a continuance to give them additional time to search for the informant. They did not request a subpoena or missing witness arrest warrant to secure the government's assistance to find him. Instead, renewing their request for a missing witness instruction, defense counsel argued that the fact that it had taken them only "twenty-two minutes" to place Larain at a spot where he was a frequent visitor proved that the government had made no real effort to locate the informant. In addition, they contended that Agent Siebert's failure to mention at the *Petrozziello* hearing that Larain had been connected with a nightly show at the Holiday Inn indicated that the government had intentionally withheld relevant information from defense counsel. Finally, the defense stated the following:

> Every person we spoke to yesterday was pleasant and Alberto [Larain], no one whispered his name. They told us things about him. . . . Your Honor, it was easy.

In its ruling, the district court first noted that there was no evidence in the record that at the pretrial conference the defendants had requested the government to do anything more than report on Larain's current status. Then, accepting defense counsel's representations concerning what had happened the night before as true, the court stated:

> [T]he statement of counsel [is] a two-edged sword because it demonstrates to me that [if] there was some effort, and not very much, I would say, Mr. Larain can or could have been located by the defense and they certainly didn't have to rely on the information they received

> yesterday. But [if] Mr. Larain is [as] popular as he seems to be, then it would seem to me that with some minor effort he could have been located.

Noting that the defense had offered evidence on Ariza's sizeable wealth to explain why he had $5 million in cashier's checks on his person when he was arrested, the court stated that the defendants could have afforded to hire an investigator, and, because Larain's name and last whereabouts were known, could have located and subpoenaed the informant or sought a material witness arrest warrant from the court. On the evidence before it, the court found "that Mr. Larain is just as available to the defense as he is to the government . . . ,"[13] and denied the request for a missing witness instruction.

Following this ruling, the parties made their closing arguments. Both defendants argued that the jury should draw a negative inference from the government's failure to produce Larain, and its agreement with the informant not to rely on his testimony. In its rebuttal, the government explained that it had not called Larain because he was a paid informant with a criminal record whose credibility would have been questioned on the stand.

III.

Appellants' first argument is that in holding that defendants were required to establish that they had made some effort to find the informant before it would compel the government to locate him, the district court applied an incorrect legal standard, by reason of which this court should reverse their convictions. We have observed that "the government's duty with respect to *production* of an informant, as distinguished from its duty to merely name the informant, is not easily stated." *United States* v. *Diaz*, 535 F.2d 130, 134 (1st Cir. 1976)

[13] In so finding, the court stated that Larain's involvement in three open cases prepared by DEA was insufficient to establish that the informant was in the government's control, in light of the government's agreement not to call Larain as its witness and the fact that he was no longer an active informant.

(emphasis in original). The leading case is *United States* v. *Davila Williams*, *supra*, in which this court declared that:

> [T]he government's duty under *Roviaro* to produce names and addresses requires it to produce correct information or at least to have exercised diligence reasonable under the circumstances to locate the informer. . . . *How far it must go to keep track of, or search for, an informer is less easily stated; that depends on many factors including the extent of the government's control over the witness, the importance of the witness's testimony, the difficulty of finding him, and similar matters.* We do not accept a flat rule requiring production of all informer witnesses whenever the government has not disclosed their names before trial. . . . But should an informer disappear or become unavailable to the defense, we would compel the government, upon timely demand, either to locate him or make an affirmative showing satisfactory to the court why it could not reasonably be expected to do so and of its diligence generally as regards the disappearance.

496 F.2d at 382 (citations omitted and emphasis supplied).

There is no dispute that, at least by the commencement of the *Petrozziello* hearing, the defendants had requested the government to provide them with Larain's address at the time of the second trial. The government did not do so, claiming that Larain was no longer an active informant and that his current whereabouts were unknown. Instead, at the *Petrozziello* hearing, Jorge testified concerning the informant's Laguna Gardens apartment, where, the agent admitted, Larain was no longer living. In addition, Agent Siebert described an accidental encounter with the informant that had taken place some months earlier at the Condado Holiday Inn.[14] The agents' testimony, and the DEA memoranda con-

[14] Siebert's failure to disclose at the *Petrozziello* hearing that Larain had had a show at the nightclub in the Holiday Inn is discussed in part IV, *infra*.

cerning Larain's deactivation, his "relocation" on the mainland, and his moiety claims, constituted all the information given to the defendants by the government at or before the *Petrozziello* hearing that might reasonably have aided them had they sought to search for Larain. On the basis of this information, and a finding that previous defense counsel had been given the Laguna Gardens address at the earlier trial, the district court ruled, relying on *United States* v. *Turbide*, *supra*, that the defendants knew Larain, and were therefore not entitled to government assistance in locating him because they had not made any effort to find him.

The district court's ruling is inconsistent with our conclusion in *Davila Williams* that the government's duty with respect to production of an informant "is dependent on several factors, among them the extent of the government's control of the witness, the importance of the witness' testimony, and the difficulty in finding the witness." *United States* v. *Diaz*, *supra*, 535 F.2d at 134. In *United States* v. *DeJesus Boria*, 518 F.2d 368, 373 (1st Cir. 1975), we stated that *Davila Williams* "made it clear that the bare furnishing of a name and non-usable address might not suffice if, with reasonable diligence, the Government could locate the informer." Where the defendant had requested the informant's address, searched unsuccessfully for him, and then moved for an order requiring the government to produce him, we concluded that "the government's flat refusal even to consider doing more [than providing defense counsel with a non-usable address]...did not meet *Williams*' standards." *Id. See also United States* v. *Nutile*, 550 F.2d 701, 704 (1st Cir. 1977) (Where "the government was unable accurately to identify the whereabouts of its informer...we...inquire[d] in light of...*Davila Williams*, *supra*, as to the adequacy of its efforts to locate [him].")

Jorge's one telephone call to the Laguna Gardens apartment is the only governmental effort to locate Larain as to which

there is clear evidence in the record.[15] The government does not, and could not, contend that the single call constitutes diligent effort to locate the informant. *See United States* v. *Nutile*, *supra*, 550 F.2d at 703-04. Moreover, despite the prosecutor's representation at the conclusion of the *Petrozziello* hearing that his agent would "continue to find out where [Larain] is," Agent Jorge testified five days later that "[n]obody has told me that I have to locate [L]arain or even try." Thus, even after it had assumed an obligation to locate the informant, the government did not instruct Larain's former partner of the need to do so.

Applying the factors listed in *Davila Williams* to the facts of this case, we would be compelled to reverse the convictions were we not convinced that appellants were in no way prejudiced by the government's failure to search for Larain. Rather than showing that they desired the testimony of the informant, defense counsel's conduct throughout the trial "suggests strongly that [they] desired grounds for reversible error," *cf. United States* v. *Bonilla*, 615 F.2d 1262, 1264 (9th Cir. 1980) or for obtaining a missing witness instruction, *cf. United States* v. *Davila Williams*, *supra*, 496 F.2d at 382-83.

Throughout the pretrial maneuvering in this case, appellants never formally requested the government to produce its informant. When they finally did so, on the third day of the *Petrozziello* hearing conducted after the second trial had commenced, in the very next sentence defense counsel renewed their request for a missing witness instruction. *See* n. 8, *supra*. As we stated in *United States* v. *Diaz*, *supra*, 535 F.2d at 135 n.5, "[t]he request for such an instruction sometimes indicates that defense counsel is more interested in exploiting the witness's absence than seeing him produced." Appellants' complete failure to take any actions consistent with a sincere

[15] Agent Siebert's testimony concerning other attempts by Jorge and other agents to find the informant are hearsay and are contradicted by Jorge's own testimony. *See* n. 11, *supra*.

interest in obtaining the informant's testimony leads us to conclude, as the district court apparently concluded,[16] that their objective throughout the proceedings was not to obtain Larain's testimony but to obtain a tactical advantage at trial and on appeal from his absence.

As the district court noted, although the defendants introduced evidence indicating that Ariza is a man with considerable wealth, they did not hire an investigator to search for the informant. *Cf. United States* v. *DeJesus Boria*, *supra*, 518 F.2d at 371 (in which the defendant moved for an appointment of an investigator to aid him in finding an informant). They never attempted to subpoena the informant, *see United States* v. *Russo*, 540 F.2d 1152, 1154-55 (1st Cir.), *cert. denied*, 429 U.S. 1000 (1976), or to obtain a bench warrant requiring the government to secure his presence at trial, *see United States* v. *Fera*, 616 F.2d 590, 597 (1st Cir.), *cert. denied*, 446 U.S. 969 (1980). Throughout the proceedings, defendants never made an offer of proof concerning how Larain's testimony might aid their case. *See United States* v. *DeJesus Boria*, *supra*, 518 F.2d at 368.

[16] Shortly before the conclusion of the *Petrozziello* hearing, the following exchange took place:

> THE COURT: [Larain] is a man whose name you have known for two years and whose address you have known for some time. . . . [Y]ou haven't indicated to the Court that you have made any effort. [y]ou haven't shown one iota of effort . . trying to locate him.
>
> [Defense Counsel]: Your Honor, okay, let me ask you this—
>
> THE COURT: As a matter of fact you know what this leads me to believe, . . . it leads me to believe not only [from] this hearing but from what I read of the Court of Appeals case, I am not so sure you really want to locate him.
>
> [Defense Counsel]: I would love to speak with him, Your Honor, and I think that we have certain evidence I would be delighted to give it to the Court that I think that Larain would be seriously concerned with confronting Your Honor if he appeared here. As a matter of fact, Your Honor, Larain could only lessen the input of the government's case . . . because . . . . if he was a valuable witness, . . . the government certainly would have him here.

This last statement constitutes the nearest thing to an "offer of proof" concerning how Larain would testify if called.

Finally, on the ninth day of trial, after visiting the Condado Holiday Inn and the Don Pepe restaurant and determining that Larain frequented the latter several times each week, defense counsel informed the court how easy it was to obtain information about Larain. Yet, although they possessed information that caused the district court to find that with some effort defendants could locate the informant, defense counsel did not seek a continuance to allow them tc press their search for Larain. *Cf. United States* v. *Davila Williams, supra; United States* v. *Haldeman*, 559 F.2d 31, 83 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). Instead, they simply renewed their request for a missing witness instruction. After learning of Larain's frequent visits to the Don Pepe, there is no indication that, with some diligence, defense counsel could not have located the informant. *See United States* v. *Russo, supra*, 540 F.2d at 1155. In the absence of a credible showing that Larain's testimony would be helpful to appellants' case, *see id.* and n. 16, *supra*, we do not believe that rewarding appellants' tactics with a new trial would either serve or honor the "fundamental requirements of fairness" that *Roviaro* and *Davila Williams* were designed to foster. *Roviaro* v. *United States, supra*, 353 U.S. at 60.

IV.

Appellants' second contention is founded on essentially the same facts as the first but asserts a different legal theory. Their contention is that the charges against the defendants should be dismissed because the government deliberately withheld and mischaracterized information concerning Larain's whereabouts in violation of their right to due process. In substance, appellants' allegations of prosecutorial misconduct are threefold: First, that despite their pretrial requests, the government withheld all *Roviaro* information from defendants until the first day of trial. Second, that at the *Petrozziello* hearing, Agent Siebert failed to disclose that Larain had

recently been working at the Condado Holiday Inn. Third, that at the *Petrozziello* hearing, the government misled defendants by characterizing the Laguna Gardens apartment as the informant's last known address when more recent information concerning his whereabouts was available. We examine the facts underlying these claims before addressing the consequences of the government's conduct.

A.

As we have stated above, defendants first made known their interest in Larain's whereabouts at the pretrial conference before the magistrate on November 21, 1979. At that time, the prosecutor told defense counsel that he did not know Larain's address and agreed to inform them of Larain's status by November 29, 1979. On December 3, 1979, defense counsel wrote to the prosecutor asking to be informed if Larain's whereabouts became known. That letter was received by the prosecutor on Thursday, December 6, 1979. The government did not supply defendants with any information concerning Larain until Monday, December 10, 1979, the first day of the trial.

When a defendant makes a request for information concerning an informant's whereabouts, the government should comply promptly, unless it asserts a privilege under *Roviaro* not to do so. *See Roviaro* v. *United States, supra*. 353 U.S. at 59-62.[17] In light of the clear indication that Larain's availability might be an issue at the new trial, see Ariza I, 605 F.2d at 1219-20 n.3, and the impending trial, the government's delay in responding to defendants' request does not constitute prompt compliance.

[17] In its brief, the government suggests that there was evidence that a "contract" had been placed on the life of Agent Jorge before the first trial as a result of his actions in this case, and that therefore the prosecution was properly concerned with the safety of its informant. We note, however, that the government did not make any references to the contract on Jorge at the second trial, and did not assert any privilege from providing evidence concerning Larain's whereabouts.

Although Special Agent Siebert possessed knowledge relevant to Larain's whereabouts, the government did not call him as its witness at the *Petrozziello* hearing. When called by the defense, Siebert revealed his accidental encounter with Larain at the Condado Holiday Inn some months before, and made a reference suggesting some knowledge of the informant's contacts with the hotel.[18] However, at the hearing the agent never indicated, as he later would at trial, that Larain had had a nightly show at the Holiday Inn or that the informant had told him during their chance meeting that he was working at the hotel.

If, when requested by a defendant to produce an informant, the government seeks to thrust the burden of locating the witness on the defense, at the very least it has an obligation to supply the defendant with all information that might reasonably be helpful in the search. Because Larain's business involvement with the Holiday Inn was likely to lead to fresh information concerning his whereabouts, Siebert's failure to reveal this fact at the *Petrozziello* hearing constituted a breach of this obligation.

Citing *United States* v. *DeJesus Boria*, *supra*, appellants argue that in furnishing defendants with Larain's "last known address" the government mischaracterized the information in its possession concerning Larain's whereabouts. This argu-

[18] During the hearing, the following exchange took place:

Q. Other than what you think Jorge may have done, any other efforts that you know that were made by anybody to locate Mr. Larain within the past two years?

A. Other than by telephone to his previous home address, other than checking at the Condado Holiday [illegible] no, I don't.

Q. Yet when you saw him you passed the time of day and let him go, is that right?

A. We exchanged a few comments and that was the size of it, yes.

In light of Siebert's testimony at trial that he knew Larain had worked at the Holiday Inn, it is hard to understand why this statement did not jar Siebert's memory concerning Larain's association with the hotel or provoke further questioning by defense counsel who were purportedly intent on finding the informant.

ment is without merit. In *DeJesus Boria*, the prosecution gave the defense what it described as the informant's "last known address" some time after a government agent had taken him to the airport to leave the jurisdiction. Rejecting the district court's finding that the prosecution's disclosure had been adequate, we stated that "[f]urnishing the informer's 'last known address' implied that the Government was furnishing its most current information about the informer's whereabouts." *Id.*, 518 F.2d at 372. In the instant case, when Agent Jorge testified concerning the Laguna Gardens address, he clearly stated that Larain no longer lived there. Thus, unlike *DeJesus Boria*, here the government did not represent that the address it supplied to the defendants was current.

B.

In *United States* v. *Davila Williams*, *supra*, we stated that "[i]t would be serious misconduct for the government intentionally to withhold or falsify the *Roviaro* information." 496 F.2d at 382. Our later decisions have made it clear that in each instance where an allegation of such behavior is made, the court must determine whether "the Government's conduct was so reprehensible as to necessitate reversal in our supervisory capacity or . . . [whether] there was such prejudice to appellant as might otherwise require reversal." *United States* v. *DeJesus Boria*, *supra*, 535 F.2d at 373. *See United States* v. *Houghton*, 554 F.2d 1219, 1223-25 (1st Cir.), *cert. denied*, 434 U.S. 851 (1977).

Unlike the cases cited by appellants, here the government did not remove its informant from the jurisdiction. *United States* v. *Calzada*, 579 F.2d 1358, 1362 (7th Cir.), *cert. denied*, 439 U.S. 900 (1978); *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), or otherwise prohibit the witness from testifying. *See Washington* v. *Texas*, 388 U.S. 14 (1967). We do not condone the government's misconduct in this case, but we do not consider a dismissal to be appropriate in the absence of some showing of prejudice by the defendants. *See United States* v. *DeJesus Boria*, *supra*.

We turn next to the issue of prejudice. In the present case, citing the goverment's agreement not to rely on Larain's testimony and the DEA memorandum suggesting that the informant had moved to the mainland, appellants argue that as a result of its failure to search for Larain and to supply the *Roviaro* information in a timely manner, "the Government affirmatively denied the appellants access to the informant...[and] was clearly complicitous in [his] unavailability." Brief for Appellants 59. However, as is discussed in part V, *infra*, the ease with which defense counsel were able to obtain information leading them to a restaurant frequently visited by Larain rebuts their contention that the informant *was* unavailable at the time of the second trial. Where prosecutorial misconduct affecting the availability of a witness is proved, a court weighing a claim of prejudice may appropriately take into account the difficulty of obtaining relevant evidence. But, in assessing the likelihood of prejudice, a court must also take into account a defendant's lack of effort to pursue known leads. In light of the complete absence of evidence that Larain's testimony would be helpful to the defendants and their failure to undertake any efforts consistent with a desire to locate the informant, *see* part III, *supra*, we hold that no prejudice to the defendants resulted from the government's misconduct in this case.

V.

Appellants' final argument is that the district court erred in denying their request for a missing witness instruction. The government contends that defendants failed to object to the court's charge and that therefore on appeal this court's review should be limited to determining whether it was "plain error" to deny the request. Fed. R. Crim. P. 30, 52. *See United States* v. *Thomann*, 609 F.2d 560, 565 (1st Cir. 1979). We agree that on the record before us[19] appellants' contention fails because

[19] At oral argument appellants represented that there had been a timely objection to the charge. However, the record does not show that defendants made any objections to the instructions given by the district court.

of the absence of an objection to the charge and their failure to show that it was "plain error" not to give a missing witness instruction. We conclude that the appellants' contention must be rejected on other grounds as well.

Citing *United States* v. *Johnson*, 467 F.2d 804 (1st Cir. 1972), *cert. denied*, 410 U.S. 909 (1973), appellants argue that Larain's former status as a paid informant suggests that "he would undoubtedly be expected to favor the government" and that the district court erred in failing to give sufficient weight to his relationship with the government in determining whether the informant was available to both sides. In *Johnson*, we held that:

> [a] witness's availability is not to be decided on the basis of his physical presence in the court room or his accessibility by writ of habeas corpus or by subpoena. . . . [A] witness's practical and legal availability is to be determined on the basis of his disposition and relationship toward the parties. . . . Where the court finds that an uncalled witness is clearly favorably disposed toward one of the parties, an instruction, if requested, may properly be given that the jury may draw an inference favorable to the other party. . . . In those cases where the bias or disposition of an uncalled witness is not able to be ascertained, "the failure to produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances." (Emphasis deleted.) 2 Wigmore on Evidence § 288, at 171 (3d ed. 1940).

Id. at 890 (citations omitted). *See United States* v. *Wright*, 573 F.2d 681, 684 (1st Cir.), *cert. denied*, 436 U.S. 949 (1978). Because our statement in *Johnson* regarding "disposition" of the witness may appear to be in conflict with language in subsequent opinions suggesting that a witness' "availability" is solely determined by the feasibility of obtaining his testimony at trial, *United States* v. *Diaz*, 535 F.2d at 135, n.5, *United*

States v. *Davila Williams*, 496 F.2d at 383, we examine the rationale for missing witness instructions in some detail.

In the absence of a satisfactory explanation, when a party fails to call a witness whom that party would ordinarily produce if the facts known by the witness were favorable to that party, the jury may infer that the absent witness's testimony would have been adverse to that party. *See* 2 Wigmore, Evidence §§ 285-88 (Chadbourn rev. 1979). This adverse inference may not reasonably be drawn, however, unless the evidence shows that the witness is available to testify on behalf of the party, that the testimony of the witness would be relevant and noncumulative, and that the witness is not prejudiced against the nonproducing party. *Id.* Because the occasion for drawing such an inference arises when both parties have failed to call a material witness, if the jury is to attribute negative consequences to only one party's failure to do so, it must determine which of the parties is likely to be withholding damaging testimony. Thus, the jury may draw an inference adverse to a party toward whom the missing witness is "favorably disposed," because the party would normally be expected to produce such a witness, *see United States* v. *Johnson*, *supra*, 467 F.2d at 809; *United States* v. *Wright*, *supra*, 573 F.2d at 689. In addition, the jury may draw an adverse inference when a party fails to produce a material witness who is peculiarly available to that party. *United States* v. *Davila Williams*, *supra*, *United States* v. *Diaz*, *supra*. *See* 2 C. Wright, Federal Practice & Procedure, Criminal § 489 (1969). As *Johnson* makes clear, a party's ability to produce a witness is often dependent on the witness's predisposition toward that party. However, when a party having *exclusive* control over a witness who could provide relevant, noncumulative testimony fails to produce the witness, it is permissible to draw an adverse inference from that party's failure to do so, even in the absence of any showing of the witness's predisposition toward the party. *See United States* v. *Calvin Earl Johnson*, 562 F.2d

514, 517 (8th Cir. 1977). Typically, what is referred to as "an absent witness" or "missing witness" instruction deals only with "control," not with "predisposition." *See, e.g.*, E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 17.19 (3d ed. 1977);[20] Federal Criminal Jury Instructions of the Seventh Circuit § 3.25 (1980).

Although defendants orally requested a "missing witness instruction" several times during the trial, they did not, either orally or in writing, set forth the language of their proposed instruction.[21] Throughout the discussions concerning their request, defendants repeatedly argued that the informant remained in the government's control, and that because of the prosecution's meager efforts to produce him, the district court should find that Larain was less available to the defense than to the government. Defendants never argued that the jurors should be instructed that they may draw an inference adverse to the government from the fact that, as a former informant, Larain was likely to be favorably disposed toward the prosecution,[22] perhaps because doing so would have undermined their contention that the government's failure to produce him resulted in prejudice to the defense. *See* part III, *supra*.

[20] § 17.19. ABSENCE OF WITNESS

If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party. However, no such conclusion should be drawn by you with regard to a witness who is equally available to both parties, or where the witness's testimony would be merely cumulative.

The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

[21] The defendants did file a request for additional instructions setting forth specific language on reasonable doubt.

[22] In their closings, defendants repeatedly argued, without objection by the government or instruction by the court, that the jury should draw a negative inference from the government's failure to call Larain as its witness. That they did so materially undercuts appellants' argument that the denial of a missing witness instruction deprived them of an inference favorable to the defense.

In light of the dominant connotation of "missing witness" instructions as referring only to a party's failure to call a material witness in its control, and the defendants' failure to make a specific request for an instruction or a finding concerning the disposition of the witness, we conclude that no request for an instruction *concerning the predisposition of the missing witness* was made to the district court. Therefore, the question whether the district court should have given a missing witness instruction turns solely on whether Larain was in the government's control.

We conclude that he was not. On the last day of the trial, during their argument for a missing witness instruction, defense counsel emphasized the ease with which they had been able to obtain information concerning Larain's whereabouts during the visit to the Don Pepe on the preceding evening. *See* p. 13, *supra*. In light of our discussion above and the absence of evidence that anyone connected with the prosecution either knew where to find Larain or had attempted to interfere with defendants' ability to obtain his testimony, we conclude that the district court did not err either in concluding that Larain was equally available to both parties or in failing to give a missing witness instruction.

Affirmed.

BOWNES, *Circuit Judge* (dissenting). The majority opinion ably and fully sets forth the facts and pertinent cases. But I cannot accept its result. As a court, we must at all times preserve the integrity of our legal system. We cannot sanction or appear to condone deceitful and improper conduct by the Government.

A fair reading of the majority opinion can lead to but one conclusion: the Government behaved egregiously. The facts make it clear that the Government could easily have complied

with its commitment to the magistrate that it "will inform the defendants, by not later than November 29, 1979, [of] the present status of its informant." Not only did it blithely ignore its agreement, worse still, it withheld relevant information. Some months before the *Petrozziello* hearing, Agent Siebert had a chance encounter at the Holiday Inn with Larain, who told him that he had had a nightly show at the hotel and was still working there. Such information could obviously have facilitated the search for Larain, but the government agent dissimulated and did not reveal the full extent of his knowledge at the *Petrozziello* hearing. This was not the only instance of the Government's breaching an obligation it made to the court. At the conclusion of the *Petrozziello* hearing, the prosecutor promised that his agent "would continue to find out where [Larain] is." Five days after this representation, Agent Jorge testified that no one had told him to find Larain or even try to do so. Moreover, as the record indicates, the Government made but one telephone call to the informant's apartment—hardly an assiduous effort to secure information as to his whereabouts.

In *Davila Williams*, as the majority notes, we stated that "[i]t would be serious misconduct for the government intentionally to withhold or falsify the *Roviaro* information." *United States* v. *Davila Williams*, 496 F.2d 378, 382 (1st Cir. 1974). In my view, the tactics of the Government here constitute "serious misconduct." While this court has not yet determined precisely how far the Government "must go to keep track of, or search for, an informer," *id.* at 382, at a minimum the prosecution's duty requires that it "produce correct information or at least have exercised diligence reasonable under the circumstances to locate the informer." *Id.* The Government, as the majority concedes, did not satisfy the mandate of *Roviaro*: it did not furnish accurate and complete information to the defendant and failed to comply promptly with defendant's request regarding the informant's whereabouts.

The majority states that it would be compelled to reverse the convictions were it convinced that appellants had suffered prejudice.[1] My colleagues, in effect, balance two factors—governmental misconduct and defense counsel's failure to show prejudice—and give greater weight to the latter. This shifting of the focus from the Government's misconduct to the tactics of defense counsel puts us in the position of condoning the Government's actions. I assume that the majority would agree that at some point governmental misconduct cannot be tolerated or excused regardless of the actions of the defendant. Drawing the line is, of course, an arguable matter. I believe that the Government, which represents us all, should strive to be beyond reproach in the conduct of a prosecution; to expect less damages the sinews of our legal structure. For me, the issue is not whether defense counsel failed to show prejudice; the critical question is how the Government acted. The agents of government are repositories of the public trust and must be worthy of it. They should conform to a rigorous standard of probity. Nearly a half-century ago, the Supreme Court examined the duties of the government prosecutor and declared:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a

[1] My brethren fault the defense for failing to show how Larain's testimony would have been helpful to defendants. It is not clear to me how the defense could have made such a showing when they were deprived of the opportunity to interview the informant. The majority speculates that the defense was not seriously interested in searching for Larain, but rather sought grounds for reversible error. Speculation is an uncertain enterprise, and for that reason I think it unwise to make too much of it. Defense counsel's behavior, however, could be interpreted differently. My colleagues may presume too much about defense counsel's cunning. The failure of the defense to present, either orally or in writing, the language of their proposed "missing witness" instruction and to object to the omission of it from the court's charge hardly suggests astuteness or skillful tactics.

> peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one.

Berger v. *United states*, 295 U.S. 78, 88 (1935). Those words still ring true and should apply to all those engaged in government service. I believe that the Government's conduct was so improper as to require that we dismiss the indictment in the exercise of our supervisory powers, *see United States* v. *DeJesus Boria*, 518 F.2d 368, 373 (1st Cir. 1975).

APPENDIX B

FIRST OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, DECIDED ON SEPTEMBER 20, 1981

UNITED STATES of America, Appellee,

v.

Teodoro ARIZA-IBARA, Defendant, Appellant.

UNITED STATES of America, Appellee,

v.

Alvaro RODRIGUEZ AMADOR,
Defendant, Appellant.

Nos. 78-1125, 78-1229.

United States Court of Appeals, First Circuit.

Argued April 3, 1979 Decided Sept. 20, 1979.

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Michael A. Young, New York City, with whom Goldberger, Feldman & Dubin, New York City, was on brief for appellant Teodoro Ariza-Ibarra.

Carlos Perez Olivo, San Juan, P.R., on brief for appellant Alvaro Rodriguez Amador.

Justo Arenas Fernandez, Asst. U.S. Atty., San Juan,

P.R., with whom Julio Morales Sanchez, U.S. Atty., San Juan, P.R., was on brief for appellee.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

Teodoro Ariza-Ibarra, a Colombian, and Alvaro Rodriguez Amador, a Spanish citizen resident in Puerto Rico, were convicted by a jury in the federal district court of Puerto Rico of conspiracy to import 50,000 pounds of marijuana and 25 kilos of cocaine from Colombia into the United States. See 21 U.S.C. §§952(a), 963.

As portrayed by the prosecution, Ariza was a Colombia-based supplier of drugs, while Rodriguez—who dealt in vessels suitable for drug smuggling—was one of his lieutenants. Both defendants were arrested in the afternoon of January 31, 1978 at the international airport in San Juan. Their capture followed an undercover operation in which Drug Enforcement Administration (DEA) agents and an informer posed as would-be drug purchasers. Meeting with defendants on January 30 and 31, the undercover operatives made final arrangements to procure from them a shipment of Colombian cocaine, with a marijuana deal to follow. Before any part of the transaction was consummated defendants went to the airport; fearing that they were planning to depart, DEA agents arrested them. Defendants were not charged with commission of any substantive offense, but rather with the conspiracy to import that was allegedly hatched in the presence of the undercover operatives.

The prosecution's case was based largely on the testimony of a witness named Fortunato Jorge, a DEA agent stationed in Puerto Rico. Jorge testified that he learned about Ariza from an informer named Alberto Larain Mestre, with whom he had worked in the past. Beginning on November 30, 1977, Larain and Jorge, operating from Puerto Rico, undertook a series of

telephone inquiries to Ariza and certain associates in Colombia and Miami, seeking to initiate meetings at which purchases of cocaine and marijuana could be arranged. Tapes of these calls, recorded by Jorge, were placed in evidence to corroborate Jorge's testimony of these initial contacts.[1] Jorge testified that face-to-face meetings, at which he as well as Larain were present, eventually also occurred, in Miami and Puerto Rico.[2] He recounted a meeting in Puerto Rico on board the vessel Wendy B, at which Rodriguez indicated his readiness to furnish drugs in concert with Ariza. The Wendy B, which was being reconditioned with a new engine and larger fuel tanks, and other boats were to be made available to transport the drugs to Puerto Rico. Jorge also testified that he and Larain met with Ariza in Miami and Puerto Rico. They agreed that Ariza would furnish, with Rodriguez' assistance 25 kilos of cocaine at $25,000 a kilo, with a separate commission for Rodriguez. While this deal encompassed cocaine only, Jorge testified to an understanding that Ariza would later furnish 50,000 pounds of marijuana for $6,000,000. Ariza insisted on a $300,000 down payment for the cocaine, to which Larain and Jorge finally agreed. It was while Larain and Jorge were stalling the delivery of the down payment that defendants went to the airport where they were arrested.

The tapes that went into evidence were of the preliminary telephone conversations with Ariza and his associates aimed at setting up the personal encounters later realized. The taped conversations were without express mention of drugs, but did give support to Jorge's testimony as to these preliminary contacts with Ariza. It

1. Many of the calls were made by Larain in Jorge's presence. Jorge testified that Larain authorized him to tape them.

2. These key meetings were not taped.

was natural that Ariza and his associates would be wary of mentioning the true nature of the business on the telephone. Guarded references to "coffee" and "furniture" could well have been cover words for other substances, and the conversations were so deliberately cryptic as to suggest illicit rather than ordinary commercial dealings. Nonetheless, the tapes by themselves were ambivalent as to what defendants were up to. It was Jorge's testimony of what defendants said at the later, unrecorded, meetings that provided the government with its basic case.

Jorge's associate, the informer Larain, was not called as a witness by either the government or the defense.[3] But while Jorge was the only witness to testify to defendants' criminal conversations, the prosecution did introduce other evidence, in addition to the tapes, to support its picture of Ariza as a major drug dealer. Another agent testified that ten cashier's checks totalling the sum of

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3. At one point during the trial, after defense counsel had objected to the testimony about Larain and said, "We are entitled to cross-examine that fellow," the prosecutor said, "You can subpoena him." The record shows that defense counsel then said "Where?" and that there was no response. While the government did not then produce Larain's address, as it would have been required to do under *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), in response to a proper request by defendant, there is no indication that the defense ever made an explicit request. At oral argument in this court, the government represented that it had an understanding with Larain that he would not have to testify at trial, a stetement that raises questions as to the government's intentions and capabilities under *Roviaro.* As a new trial must be held in any event, we do not decide whether defendants' rights under *Roviaro* were in any way implicated.

$5,000,000 were found concealed in Ariza's left shoe when he was arrested. These were placed in evidence, and the prosecution asked the jury to infer that Ariza intended to use this money to procure drugs such as he had agreed to sell to the undercover operatives. A third DEA agent, Rivera, testified that he had "known of" defendants since November 1977, that he had met Rodriguez in early January 1978 while acting as an undercover agent with Jorge, that he first saw Ariza on January 30 and that he helped arrest defendants on January 31.[4] An officer of the Puerto Rico bank that issued the cashier's checks testified that Ariza came there on November 23, 1977 and opened an account, ostensibly to receive proceeds from dealings in coffee and cattle. The banker testified that deposits in excess of $5,000,000 were made prior to January 30, 1978 with cash brought into the bank in suitcases. On January 30 most of the money was converted into the ten $500,000 cashier's checks found in Ariza's shoe the next day. Two other witnesses testified as to extensive repairs that had been made to the Wendy B that would have increased her cruising range and seaworthiness considerably.

The government also placed in evidence, over objection, certain documents from the files of the Hotel Excelsior in Puerto Rico reflecting that Ariza was a guest there for several nights in November and December 1977 and in January 1978, and that in November 1977 messages for him were left by someone who identified himself as Larain.

Ariza called only one witness: a Puerto Rican lawyer whom he had hired to represent him in tax proceedings in-

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4. Agent Rivera's testimony is recounted in greater detail *infra*, as defendants argue that certain portions of it were admitted improperly.

itiated by the United States after discovery of the $5,000,000. Based on a visit to Colombia, this witness testified that Ariza owned ranch lands, cattle and other property there valued at many millions. It was the witness's understanding that the foundation of Ariza's wealth was legitimate business activity in cattle, coffee and the like. Given the lawyer's lack of specific information about Ariza's business dealings, however, the jury could have thought that the sources of the $5,000,000 found in Ariza's possession and of his wealth in Colombia were little clarified by this witness.

Against this bacakground, we now consider appellants' objections. They do not deny the legal sufficiency of the evidence to convict, but assert that errors were made, especially in the admission of prejudicial evidence.

I. Reliability, Past Activities and Statements Attributed to the Non-Witness Informant Larain

Defendants' chief objections on appeal are that the court erred in allowing Jorge, in the course of his testimony, to testify to Larain's purported reputation for reliability. This, together with Jorge's relating of certain information coming from Larain, is said to have been tantamount to making Larain, although absent and hence unavailable for cross-examination, a second government witness to the conspiracy itself.

A. Larain's reliability and hearsay statements identifying defendants as drug dealers

Before trial, defendants moved to suppress the evidence found on their persons when they were arrested, asserting that there was no probable cause to arrest them. Agent Rivera, who made the decision to arrest, outlined the information that caused him to do so, cited Larain as a

major source of that information, and quite properly testified to Larain's reliability in other investigations in order to demonstrate that the agents had good reason to credit him. The court sustained the arrests and the seizures.

So far, all procedures were correct. Unfortunately, however, after the trial began, the prosecution decided once again to pursue the issue of the informer's reliability, this time in front of the jury. In his opening statement the prosecutor said:

> "Now, you will hear during the course of this case that there was an informant. His name is Alberto Larain Mestre. This informant you will hear from the undercover agent, Mr. Fortunato Jorge, who will testify was recruited originally in Spain and he has been working continuously thereafter with the Drug Enforcement Administration for the last seven years. In order that you may gauge the reliability of this informant we will bring evidence to you that this informant had given evidence in other cases, has developed other cases; that the undercover agent who has been working with him had four cases in Europe."

Defendants objected to this statement and to the prosecutor's expressed intention to introduce evidence of the informant's reliability on the ground that it was both prejudicial and irrelevant, a finding of reliability having been made when probable cause to arrest was established; the question of reliability was, they argued, a question for the judge, not the jury. The court overruled the objection, but instructed the jury that the cases on which the agent and the informant had worked previously had no relation to the defendants. The prosecution then continued this line of argument, saying that,

> "What we are trying to emphasize is the fact that this informant has given information which is for you to deter-

> mine in the light of all the facts in the case whether that informant is reliable or is not reliable and, therefore, you can trust what is said about him or not."

Larain's reliability was raised again at the outset of Agent Jorge's testimony: Jorge testified that he had known Larain since 1964, that Larain became an informer in 1972, and that he established "an official relationship between agent and informer" with him in 1975. Jorge described the role of an informant in DEA investigations and, when asked how many cases he had been involved in with Larain, replied 10 or 12, four of which had resulted in arrests. Jorge stated that 19 defendants had been "developed" through these investigations. Defense counsel again objected. The government responded that it was

> "entitled to establish that the information that his man has as a result of prior experience can be trustworthy and, therefore, he acted on the information . . . He had reason to believe that information. That is our position."

The court again overruled the objection and instructed the jury,

> "The only reason I am allowing this testimony in as to previous experience of this agent with the informant is to allow you to reach a conclusion as to the reliability of this informant in previous work. I instruct you nothing that may have happened in relation to this informant in previous cases has anything to do with these two defendants. In fact, I can tell you as a matter of fact that these two defendants have not been the object of those previous investigations. It has nothing to do with these defendants."

Jorge then testified that he had worked with Larain in international investigations in the United States, South America and Europe.

The theme of Larain's reliability was raised for the last time in the prosecutor's summation to the jury:

> "Now, the most important testimony here was that of Fortunato Jorge. Fortunato Jorge is an agent who for the past 17 years has worked in drug enforcement and for the past seven years in the office of the DEA.
>
> "He told you about the informant, who he is, Mr. Alberto Larain Mestre, how the informant was recruited in Spain, how that informant has worked with Mr. Fortunato Jorge in cases which have resulted in at least 17 arrests and investigations that carried these two indviduals to nine different countries France, Spain, New York—I am sorry, cities, Santo Domingo, Colombia, Aruba, Guadelupe and from the very evidence obtained in this case which are the recordings of the conversations, you can tell the veracity of what the informant was telling Fortunato Jorge.
>
> "You recall that the informant came to Fortunato Jorge on the 30th and told him about the conversation he had with Mr. Ariza. As a result of that meeting he provided that information. He provided Mr. Jorge with two telephone numbers. . . . "

The emphasis upon Larain's reliability was coupled with testimony that Larain gave the DEA agents telephone numbers that led them to Ariza, and that Jorge was entering into drug negotiations that to some degree already had been initiated by the informer in a prior meeting with Ariza.[5] It was thus conveyed to the jury, implicitly but un-

5. The government introduced hotel records that a few days before the calls to Ariza, Ariza had been in Puerto Rico and Larain had been trying to contact him at his hotel; the calls themselves, as well as Jorge's testimony, suggest that Larain and Ariza had already discussed a drug deal—when Jorge contacted Ariza the first time, he "let him know that we were interested in continuing with the deal."

mistakably, that Larain knew firsthand that Ariza was a drug dealer—and that Larain himself was exceptionally reliable in such matters.[6]

[1-4] We are obliged to hold that the district court committed reversible error in allowing the prosecution to introduce evidence and make an issue at trial of Larain's past identifications and reliability. Defendants were entitled to have their guilt or innocence determined by the jury on the basis of evidence from witnesses that they had had an opportunity to confront at trial. *See* U.S. Const. Amend. VI; *Barber v. Page,* 390 U.S. 719, 721, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The reliability of witnesses at trial is often a legitimate issue, of course, but because the jury may not give any credit whatever to the implied testimony, much less the views concerning guilt, of an absent witness, the reliability of non-witnesses is usually wholly irrelevant. Because the absent drug informant's implied beliefs in relation to the charges against Ariza and Rodriguez were not matters for the jury to consider at all, to bolster his reliability as was done here could only serve the illegitimate purpose of directing the jury's attention to these improper items of hearsay, and of giving them enhanced credibility. See Fed. R. Evid. 801, 802; *Moore v. United States,* 429 U.S. 20, 21-22, 97 S.Ct. 29, 50 L.Ed. 2d 25 (1976); *United States v. Barash,* 365 F.2d 395, 399 (2d Cir. 1966); *Wright v. Tatham,* 7 Ad. & E. 313, 388-89, 112 Eng. Rep. 488, 516-17 (1837). Bolstering the government's case in this

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6. The same suggestion was made by Agent Rivera, who also indicated that he had heard of defendants from Larain.

manner served to place the experienced informer alongside Fortunato Jorge as an additional witness, yet one immune from cross-examination by defendants.[7]

The issue involved here is similar to those in *Barash*, 365 F.2d 395; *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973); and *United States v. Check*, 582 F.2d 668 (2d Cir. 1978). In *Barash*, 365 F.2d 395, a government witness testified that the defendant was introduced to him by a Miss Lupescu, who had "never introduced [him] to anyone except someone who was going to pay [him] off." 365 F.2d at 399. The court held that this was inadmissible hearsay because Miss Lupescu's conduct "conveyed her meaning without the use of words." *Id.* This and other errors required reversal. *Falley*, 489 F.2d 33, a drug importation case, also involved an effort by the government to establish the credibility of an informant, albeit one who did take the stand. The government introduced in evidence narcotics that the informant had brought into the country, not for the defendants but for a third party. The Second Circuit held that this evidence should have been excluded because it had no relation to the defendants and was

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7. Evidence of Larain's reliability could be considered in the pretrial suppression hearing to determine whether probable cause to arrest existed because arresting officers and courts may rely on hearsay in order to determine probable cause. *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *Jones v. United States*, 362 U.S. 257, 269, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Hearsay may not, however, be considered in determining the guilt or innocence of defendants, *e.g.*, *Moore v. United States*, 429 U.S. 20, 21, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976) (court may not rely on out-of-court declaration of informant). The government, which in most respects presented its case ably, should have been aware of this basic distinction.

highly prejudicial. 489 F.2d at 37. In *Check*, 582 F.2d 668, a government informant allegedly had been involved in meetings with the defendant but refused to testify. Spinelli, an undercover agent, became the chief government witness and, in response to careful questions on direct, so related his conversations with the informant as to convey, in effect, what the informant had said to him about his meetings with Check. The court observed that, "for much of his testimony Spinelli was serving as a transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from the informant . . . " 582 F.2d at 678.

[5] The evidence of Larain's past ability to identify drug dealers, coupled with evidence making it plain that he had so identified defendants, was tantamount to a hearsay statement by Larain incriminating defendants, just as the hearsay statements condemned in *Check*, *Barash* and *Falley* incriminated the defendants in those cases.

The question remaining is whether this error was so prejudicial as to require reversal and a new trial. To affirm, we would have to find that the error did not influence the jury or that it had but slight effect, see *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).[8] This we regret we cannot say, not-

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8. In addition to the evidence of Larain's past identifications of drug dealers and reliability and of his identification of defendants, other hearsay statements inculpating defendants and attributed to Larain were admitted as evidence. Jorge testified that he called Ariza and identified himself as a friend of Larain, and that "he had offered a business of marijuana and cocaine." As the telephone conversation made no explicit reference to drugs, this interpretation was justified only if Jorge had prior knowledge that Ariza was a dealer and would so understand the call—knowledge only Larain could have supplied. Defendants now object to this as an inadmissible

(Footnote continued on the following page)

withstanding the substantial evidence of guilt. It is true that Jorge's credibility was the central issue. If his accounts of his meetings with defendants were believed, Larain's hearsay views concerning defendants' guilt were merely cumulative. If, moreover, the jury disbelieved Jorge, it would scarcely have convicted merely because the informer was supposedly reliable, and thought defendants guilty. But one cannot confidently separate Jorge's credibility from the impression made by placing Larain's reputation for reliability, and his implied testimony against defendants, on the same side of the scale. The latter reinforced the former. The importance the prosecution placed on bringing Larain into the picture is reflected by the prosecutor's references to the informer's reliability in both his opening and closing arguments, and by his successful efforts to acquaint the jury with Larain's participation in the investigation and his knowledge of defendants' illicit activities. We cannot say that matters so strenuously and deliberately emphasized by the prosecution were harmless.

(Footnote continued from the preceding page)

hearsay statement of Larain's, but they failed to so object at trial. Later defendants did object when Jorge testified that, after a telephone conversation on December 4 with one of Ariza's henchmen, he and Larain went to Miami to continue the negotiations "about the drugs." Again, since drugs had not yet been discussed explicitly by Ariza, the fact that they were the subject of negotiation arguably was the hearsay statement of Larain—although by that time Jorge undoubtedly had his own perception of the conversations and could have been speaking for himself. In any event, defendants' objection came too late. Defendants' failure to object when this information came in initially left the jury free to consider it and subsequent hearsay of similar import. *See* Fed. R. Evid. 103(a)(1); *Diaz v. United States,* 223 U.S. 442, 450, 32 S.Ct. 250, 56 L.Ed. 500 (1912); 5 J. Wigmore, Evidence §1361, at 2 n. 1 (Chadbourn rev. 1974).

B. Larain's messages for Ariza at the Hotel Excelsior

The government established that Ariza had been in Puerto Rico in November 1977 and had opened a bank account into which about $5 million was deposited eventually.[9] These facts were introduced through the testimony of a bank officer and by introducing records of the Hotel Excelsior, where Ariza stayed. In addition to the hotel bill, which fell within the business records exception to the hearsay rule, Fed. R.Evid. 803(6), the government introduced, over objection, four telephone messages and a note, all allegedly from Larain. None of these were ever received by Ariza.

[6] The district court admitted the messages with an instruction that they were being introduced not "to prove the truth of the matter contained therein, [but] just the fact that they were there . . ." Despite the court's limiting instruction, the likely function of this evidence was to show that Larain had tried to contact Ariza.[10]

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9. Ariza did not declare any significant amount of currency on his arrival in Puerto Rico.

10. Even accepting the court's rationale for admitting the statements, we think that they should have been excluded. They were irrelevant and unnecessary to show that Ariza had stayed at the Excelsior—Ariza never received them and, in any event, the fact that he was present was already established by the more reliable hotel bill. Thus the relevance of the messages, as showing that someone thought that Ariza was at the Excelsior, was outweighed by their prejudicial effect in linking Larain and Ariza and thus further bolstering the absent witness' credibility. *See* Fed.R. Evid. 403. We do not consider the different question of admissibility that would be presented had Larain testified at trial and authenticated the messages.

Because, practically speaking, they were irrelevant to prove anything but the truth of the matter asserted, they should have been excluded. See Fed. R. Evid. 801, 802. Their chief use was, in any event, the forbidden one, see "A" above, of enhancing Larain's role in the investigation, thus shoring up his ability, in absentia, to verify that Ariza was a drug dealer.

C. Larain's statements on the tapes

[7, 8] Defendants object that the tapes of the conversations between Ariza and Larain should not have been admitted in their entirety; they argue that, while Ariza's statements were properly introduced as admissions of a party opponent, Fed. R. Evid. 801(d)(2), Larain's statements were not. Even overlooking defendants' failure to object at trial, this argument is frivolous: the tapes were properly authenticated and, because the conversations were short and consisted primarily of questions and answers, Larain's statements were essential to give content to Ariza's. *See* 7 J. Wigmore, Evidence § 2094-95 (Chadbourn rev. 1978). There is no general rule that the voices of parties to a taped telephone conversation who do not appear at trial must be suppressed. *Cf. United States v. Gladney,* 563 F.2d 491, 493 (1st Cir. 1977) (informer's unavailability at trial does not prevent showing of consent to taping of conversations).

II. Evidence of Cash Transactions

[9] Ariza argues that the evidence that large amounts of cash were deposited in his bank account in Puerto Rico and that a bank time deposit slip for $1,203,691 was found in his left shoe when he was arrested was irrelevant and inadmissible. Rodriguez similarly objects to the evidence that $5 million in cashier's checks was found on Ariza.

They stress that there was no allegation that Ariza had received the money illegally and no evidence that the money was linked to the crime charged.

We think that the evidence in question did bear on defendants' guilt and was admissible. The crime charged was a conspiracy to make a large-scale, multimillion dollar drug transaction, and the source of Ariza's funds, which had not been declared as money either brought into or earned in Puerto Rico, was highly suspect. The money involved was a large amount by any standard, and was brought into the bank in Puerto Rico in five, ten and twenty dollar bills packed in suitcases—in one instance it had taken until eleven o'clock at night to count it out. A jury might reasonably believe that one engaged in a legitimate commodities business would not operate in this way. From the modus operandi involving cash in such amounts, the jury could logically infer that defendants were in fact engaged in illicit activities of the sort indicated in the other evidence. This evidence was relevant and was properly admitted. *United States v. Tramunti,* 513 F.2d 1087, 1105 (2d Cir.), *cert. denied,* 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975) (evidence of "possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale"); *see United States v. Viserto,* 596 F.2d 531 (2d Cir. 1979); *Falley,* 489 F.2d at 38; *United States v. Hinton,* 543 F.2d 1002, 1012-13 (2d Cir.), *cert. denied,* 429 U.S. 980, 1051, 1066,

97 S.Ct. 493, 764, 796, 50 L.Ed.2d 589, 767, 783, 430 U.S. 982, 97 S.Ct. 1677, 52 L.Ed.2d 376 (1976).[11]

III. Agent Rivera's Testimony

Agent Rivera was the DEA agent who made the decision to arrest the defendants on January 31, 1978 at the airport. After he described the arrests on direct examination, he was cross-examined sharply. Defense counsels' goal seemed to be to establish that, as defendants' activities at the airport were, to all appearances, innocent, their arrests were groundless. Counsel belabored that the agents had no warrant and that one easily could have been

11. *Williams v. United States,* 168 U.S. 382, 18 S.Ct. 92, 42 L.Ed. 509 (1897), cited by defendants for the proposition that the evidence of the cash deposits was inadmissible is not on point. There the defendant was accused of taking two bribes of $85 and $100 from Chinese immigrants—a financial event of such small scale as not to suggest any connection with the bank deposits of the defendant and his wife of less than $5,000. We share the view expressed in *United States v. Jackskion,* 102 F.2d 683, 684 (2d Cir.), *cert. denied,* 307 U.S. 635, 59 S.Ct. 1032, 83 L.Ed. 1517 (1939), a bootlegging case, that,

> "[W]here a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the sudden acquisition of money by the defendant is admissible, even though the source of the money is not traced. . . .[S]uch evidence may, when taken with proof of other facts, have a logical tendency to prove criminal misconduct. The weight will of course vary, depending among other things on whether the money was kept secretively by the accused. . . . [T]he Williams case . . . is to be taken, we think, as no more than a ruling on the particular facts there presented."

secured. Coming, as it did, after the suppression proceeding at which the validity of the arrest was thoroughly explored and the court, with good reason, had ruled in favor of the government, this cross-examination was entirely misdirected, and indeed is cited by Ariza's appeal counsel as evidencing the incompetency of Ariza's trial attorney.

It is perhaps not surprising that as soon as this ill-conceived exercise ended, the prosecution leapt to its feet to establish that Rivera, indeed, had had good reason to order the arrests. The following transpired:

> "Q. You said to questions of [defense counsel] that you decided to put them under arrest because you knew of the crime that they had committed. What was that crime, in your opinion, that made the—
>
> [Defense counsel]: We object to the question because that is for the jury to decide.
>
> . . . .
>
> The Court: The objection is overruled. What was the crime that they had committed, if you know?
>
> [Rivera]: They had conspired—
>
> . . . .
>
> [Rivera]: They had conspired and agreed among them and with other people to deliver a load of 25 kilograms of cocaine and 50,000 pounds of marijuana[12] to the United States of America . . ."

12. The prosecution then asked Rivera where he had obtained this information, to which he replied:

> "I obtained that information by listening to the tapes, by having conversation with—by being present, undercover conversation between Mr. Rodriguez and Special Agent Jorge, by listening to conversations, by talking to Alberto Larain and by reading some reports."

Although this revealed that Rivera's information was to some extent based on hearsay, hearsay is a permissible basis for a determination of probable cause, see note 7, *supra,* and the testimony was relevant for the limited purpose of showng that, contrary to defendants' assertions, Rivera did have an adequate basis for arresting them.

[10] Appellants now contend that the court committed reversible error in permitting Rivera to testify as he did.

We disagree, although we think that the court should *sua sponte* have instructed the jury that Rivera's views concerning defendants' guilt were to be considered solely for the purpose of determining whether he had a reasonable basis to make the arrests, and not as evidence of their guilt in this trial. The government did not have to sit supinely by while defense counsel tried to make the jury believe that the arrests were examples of police brutality or error. As it was the defense who unwisely chose to raise the question of probable cause for the arrests, the prosecution could respond to the extent necessary to demonstrate that Rivera had, in fact, a proper basis for the arrests. To this end, Rivera was entitled to testify to the nature of the crime or crimes he believed defendants had committed when making the arrests as well as to the sources of his information.

Testimony of this sort, of course, would not have been admissible, had the defense not first rashly insisted upon raising the issue of probable cause in the presence of the jury. Rivera's opinion as to whether or not defendants were guilty was in no event admissible to prove their guilt,[13] and the narrow question of probable cause to ar-

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13. *Huff v. United States,* 273 F.2d 56, 61 (5th Cir. 1959); *Simmons v. United States,* 92 U.S. App. D.C. 122, 124-25, 206 F.2d 427, 429-30 (D.C. Cir. 1953); *Iva Ikuko Toquri D'Aquino v. United States,* 192 F.2d 338, 371 (9th Cir. 1951), *cert. denied,* 343 U.S. 935, 72 S.Ct. 772, 96 L.Ed. 1343 (1952); *Wesson v. United States,* 164 F.2d 50, 54-55 (8th Cir. 1947); *Deaver v. United States,* 81 U.S. App. D.C. 148, 152-153, 155 F.2d 740, 743 (D.C. Cir.), *cert. denied,* 329 U.S. 766, 67 S.Ct. 121, 91 L.Ed. 659 (1946).

rest, on which Rivera's earlier views concerning their guilt and the information available to him were relevant, was a legal issue that normally should have been left to the suppression hearing held outside the jury's presence. But once the defense injected the probable cause issue directly into the trial itself, the prosecution was entitled to respond by giving its witness an opportunity to demonstrate that he had probable cause to arrest. The court should then have taken pains to tell the jury that the witness' testimony concerning his information and belief as to defendants' guilt was admitted solely because relevant to whether or not Agent Rivera had reasonable cause to make the arrests. The jury should have been forbidden to consider Rivera's testimony concerning his beliefs and information about defendants' guilt as actual evidence of guilt.

If the court's failure in this situation to give a limiting instruction *sua sponte* were the sole error in a case, we would be unlikely to find plain error and reverse, although this of course would depend on all the facts and circumstances. The defense, having played with fire, is in a poor position to scream when burned. Since a new trial is required in any event, we do not pursue the matter further.

IV. Evidence of Pending Tax Case

In defense Ariza called a Puerto Rico tax lawyer who testified that he had been retained to represent Ariza in a civil tax deficiency case brought against him by the United States in relation to the $5 million found in his possession on his arrest. In an effort to suggest that the $5 million was from legitimate sources, the lawyer testified that Ariza was a wealthy man with substantial property in Colombia. He did not testify, however, to any direct link between Ariza's Colombian property and the $5 million.

[11] The government, which originally objected to the lawyer's testimony as irrelevant, brought out on cross-examination that the tax deficiency cases would not have been asserted against Ariza's property in Colombia, but rather against the $5 million deposited in one month in a bank in Puerto Rico, where Ariza had no known property. Defendants now object that the prosecution's treatment of the tax claim on cross-examination implied that Ariza had earned money illegally in Puerto Rico. Since the tax deficiency case was as yet unproven, defendants argue that this implication was "irrational and therefore constitutionally invalid," citing *Barnes v. United States,* 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973) (permissible inference that one in unexplained possession of stolen goods knew property was stolen held reasonable), and *Leary v. United States,* 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) (inference that, absent sastisfactory explanation, possessor of marijuana knew marijuana was illegally imported held irrational). This argument mischaracterizes the import of the cross-examination and is without merit. The prosecution did not argue that as a matter of law Ariza could be presumed to have earned money illegally. The defense itself had acquainted the jury with the pending tax case; it had invited inquiry into the source of the $5 million and had tried to suggest that it originated in Colombia. It was well within the permissible limits of cross-examination and impeachment to explore the possible scope of the tax claims. It was also perfectly legitimate to try to show that Ariza's vast holdings in Colombia bore little necessary relation to the $5 million that he had in Puerto Rico, and to use information developed on direct examination to "hoist defendants with their own petard." In addition to the fact that the tax case focused on Ariza's funds in Puerto Rico and not in Colombia, the prosecutor

brought out that the lawyer had seen no documents linking Ariza's money in Puerto Rico to sales of coffee, cattle or grain, and that Ariza had declared no money on entering Puerto Rico, despite a requirement that amounts in excess of $5,000 be noted. This served the legitimate impeaching function of casting doubt on the lawyer's knowledge of the true source of Ariza's wealth and on the value of his testimony on that subject. Indeed, by discrediting the witness' assurances that Ariza's wealth was derived from legitimate business sources, it enhanced the tendency of the evidence of Ariza's cash transactions to confirm the charge that Ariza was a large-scale drug dealer. See *Hinton,* 543 F.2d at 1012-13 (failure to file tax return); *cf. Falley,* 489 F.2d at 38-40 (tax returns showing low income). While Ariza understandably was chagrined at having a subject he had raised turned against him, the government did no more than employ cross-examination for a permissible purpose.

V. The Court's Charge

Defendants object to two statements by the district court in its instructions to the jury. The first came in connection with its charge on the intent required to establish a conspiracy:

> "[W]ith respect to an offense such as charged in this case, specific intent must be proved beyond reasonable doubt before there can be a conviction.
>
> . . . .
>
> "To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof and will not serve in lieu of proof. Charges of conspiracy are not to be made out by piling inference upon inference.
>
> "Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations

> of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made or done or omitted by the defendant, and all other facts and circumstances, in evidence which indicate their state of mind. *It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.*"

Although no objection was made at trial, appellants now object to the italicized sentence in this portion of the charge on the ground that it undermined the requirement that the government show specific intent to commit the crime charged.

[12] Charges that a jury "should presume that a person intends the natural and probable consequences of his acts" have been disapproved for the reason asserted by defendants, *e.g., United States v. Bertolotti,* 529 F.2d 149, 159 (2d Cir. 1975); the Supreme Court recently held unconstitutional an instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" because it suggested a mandatory inference of intent and thus may have shifted the burden of proof on the issue of intent to the defendant, *Sandstrom v. Montana,* ____U.S.____, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). In light of these cases, courts obviously should steer clear of this venerable formulation—today it is a clear invitation to appellate trouble.

While observing that the court came perilously close to committing error here, we refrain from ruling on the propriety of the instruction when doing so is unnecessary for the disposition of this case. We merely caution the court to avoid this language in future instructions.

[13] Defendants' remaining objection is that the court gave the jury several standards of proof, stating that conviction required proof beyond a reasonable doubt, that the jurors should be "convinced to a moral certainty,"

and that proof of knowledge should be "clear and unequivocal." Reading the charge as a whole, we think that it conveyed to the jury the proper "beyond a reasonable doubt" standard of proof; nevertheless, we have cautioned previously against use of language suggesting that this standard means proof to a moral certainty, *e.g., Dunn v. Perrin,* 570 F.2d 21, 24 (1st Cir.), *cert. denied,* 437 U.S. 910, 98 S.Ct. 3102, 57 L.Ed.2d 1141 (1978), and do not encourage its use on retrial.

The judgment of conviction is reversed and the case remanded for a new trial.

APPENDIX "C"

FINAL JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ENTERED MAY 13, 1981

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1112

UNITED STATES OF AMERICA,
Appellee,

v.

TEODORO ARIZA IBARRA,
Defendant-Appellant.

No. 80-1113

UNITED STATES OF AMERICA,
Appellee,

v.

ALVARO RODRIGUEZ,
Defendant-Appellant.

JUDGMENT ENTERED MAY 13, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follow: The judgment of the district court is affirmed.

By the Court:

s/ Dana H. Gallup, Clerk

APPENDIX "D"

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING REHEARING, ENTERED JUNE 5, 1981

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1112

UNITED STATES OF AMERICA,

Appellee,

v.

TEODORO ARIZA-IBARRA,

Defendant-Appellant.

No. 80-1113

UNITED STATES OF AMERICA,

Appellee,

v.

ALVARO RODRIGUEZ,

Defendant-Appellant.

Before Campbell and Bownes, *Circuit Judges,* and Keeton, *District Judge.**

Memorandum and Order Entered June 5, 1981

* Of the District of Massachusetts, sitting by designation.

In their petition for rehearing, appellants contend that the Court misread *United States v. Davila Williams,* 496 F.2d 378 (1st Cir. 1974), and *United States v. DeJesus Boria,* 518 F.2d 368 (1st Cir. 1975), by declining to reverse defendants' convictions in the absence of any prejudice resulting from the government's misconduct before and during the second trial. Contrary to appellants' assertion that the examination of prejudice conducted in *DeJesus Boria* occurred simply because the governmental misconduct was committed before our opinion in *Davila Williams,* in *DeJesus Boria* the Court turned to the question whether "the Government's conduct was such as to deprive defendant of a fair trial or else was so reprehensible as to require setting aside the exercise of its supervisory powers," after expressing its unwillingness "to say that in every instance of pre-trial disappearance even with government assistance, the Government must forfeit a conviction." 518 F.2d at 373. *See also United States v. Houghton,* 554 F.2d 1219, 1223 (1st Cir.), *cert. denied,* 434 U.S. 851 (1977), in which the Court addressed "the question of whether there was such deliberate misconduct by the government and prejudice to the defendant as to warrant dismissal of the indictment."

Moreover, appellants' assertion that the government's misconduct precluded them from interviewing Larain and establishing that they were prejudiced by his absence misconstrues both the facts and the concept of prejudice articulated in the Court's opinion. In light of "(a)ppellants' complete failure to take any actions consis-

tent with a sincere interest in obtaining the informant's testimony," slip op. at 17-18, the Court concluded that appellants had not established "that the informant *was* unavailable at the time of the second trial." *Id.*, at 23 (emphasis in original). Thus, appellants failed to establish prejudice because they failed to show Larain's unavailability to testify at the second trial.

The petition for rehearing is denied.

By the Court,

s/Dana H. Gallup, Clerk

APPENDIX "E"

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING REHEARING *EN BANC*, ENTERED JUNE 12, 1981

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1112

UNITED STATES OF AMERICA,

Appellee,

v.

TEODORO ARIZA-IBARRA,

Defendant-Appellant.

No. 80-1113

UNITED STATES OF AMERICA,

Appellee,

v.

ALVARO RODRIGUEZ,

Defendant-Appellant.

Before *COFFIN*, Chief Judge, CAMPBELL, BOWNES and BREYER, Circuit Judges

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ORDER OF COURT
Entered June 12, 1981

The panel of judges that rendered the decision in this case having denied the petition for rehearing, and no judge who was a member of the panel nor any judge in regular active service having requested a vote on the suggestion for rehearing en banc,

It is ordered that the suggestion for rehearing en banc is hereby denied.

By the Court:

s/Dana H. Gallup, Clerk

Opposition

Office-Supreme Court, U.S.
FILED
SEP 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

TEODORO ARIZA-IBARRA AND
ALVARO RODRIGUEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, petitioners' convictions should be reversed because the government failed to make a diligent effort to produce its informant at trial and did not furnish certain information concerning his whereabouts.

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TEODORO ARIZA-IBARRA AND
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) and its order denying rehearing (Pet. App. 1d-3d) are reported at 651 F. 2d 2.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c-2c) was entered on May 13, 1981. A petition for rehearing was denied on June 12, 1981 (Pet. App. 1e-2e). The petition for a writ of certiorari was filed on July 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a second jury trial in the United States District Court for the District of Puerto Rico, petitioners were convicted of conspiring to import narcotics, in violation of

21 U.S.C. 952(a) and 963.[1] Petitioner Ariza was sentenced to 15 years' imprisonment and a fine of $25,000. Petitioner Rodriguez was sentenced to seven years' imprisonment and a fine of $10,000. In addition, each petitioner received a three year special parole term.[2] The court of appeals affirmed (Pet. App. 1a-30a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2a-3a). It showed that petitioner Ariza was a Colombia-based supplier of narcotics and that petitioner Rodriguez, who dealt in vessels suitable for importing narcotics, was one of his lieutenants. In November 1977, DEA Special Agent Fortunato Jorge learned about Ariza through confidential informant Alberto Larain Maestre. Shortly thereafter, Agent Jorge and Larain undertook a series of telephone inquiries to Ariza seeking to initiate meetings at which the purchase of narcotics could be arranged.[3] After several face to face meetings attended by Agent Jorge, Larain, and both petitioners, it was agreed that petitioner Ariza would supply Agent Jorge and Larain with 25 kilos of cocaine and 50,000 pounds of marijuana. Before any part of the transaction could be consummated, however, petitioners were arrested at the San Juan Airport

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[1]Petitioners' convictions at a first trial were reversed on the ground that the trial court had erred in admitting certain evidence of an informant's past reliability. *United States* v. *Ariza-Ibarra*, 605 F. 2d 1216 (1st Cir. 1979) (Pet. App. 1b-24b).

[2]Petitioners have not challenged their special parole terms. In *Bifulco* v. *United States*, 447 U.S. 381 (1980), however, this Court held that a special parole term may not be imposed as part of a sentence for a narcotics conspiracy. Petitioners may move for correction of their sentences in the district court under Rule 35, Fed. R. Crim. P.

[3]These conversations were taped and placed in evidence at trial.

during what DEA agents feared was an attempt by them to leave the country.[4]

2. Larain, the informant, did not testify at the first trial. After the court of appeals ordered a new trial, a pretrial conference was held before a magistrate on November 21, 1979. At the conference, defense counsel announced that he wished to interview Larain, and the Assistant United States Attorney responded that Larain was no longer active as an informant and that he did not know Larain's whereabouts. In his memorandum on the conference, the magistrate reported that "it was agreed that the Government will inform the defendants, by not later than November 29, 1979, [of] the present status of its informant" (Pet. App. 4a). On December 3, 1979, Rodriguez's lawyer, then in New York, wrote to the prosecutor in charge of the case concerning various pretrial matters, including Larain's whereabouts (*id.* at 4a-5a). The government did not furnish the defense with any information concerning Larain's whereabouts before the second trial began on December 10, 1979 (*id.* at 5a).

After empaneling the jury, the district court recessed the trial and convened a hearing to consider the admissibility of certain co-conspirator statements. It agreed also to consider at the hearing the issue of Larain's availability. After the hearing began, the government furnished defense counsel with several documents concerning Larain's whereabouts (Pet. App. 5a-6a).[5] Agent Jorge was the government's only

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[4]The evidence also showed (Pet. App. 3a n.1) that $5 million in cashier's checks was found in Ariza's shoe when he was arrested; that Ariza had made several large cash deposits in his bank account around the time the conspiracy in this case was hatched; and that Rodriguez had ordered modifications to enlarge the storage capacity of his ship.

[5]On the first day of the hearing, the prosecutor gave defense counsel a copy of a September 1978 DEA memorandum indicating that Larain was being removed from active informant status. The next day, the prosecutor produced an April 1978 report that described three investigations on which Larain had worked and indicated that, since the

witness at the hearing. On direct examination, he testified that he had last seen Larain about two and one-half months earlier at a meeting arranged by Larain. He did not ask Larain where he was living at that time. Agent Jorge indicated that the last address he had for Larain was an apartment in the Laguna Gardens in Carolina, Puerto Rico. Agent Jorge stated that Larain had lived at the Laguna Gardens address before and during the first trial in this case, and that he had furnished that address to petitioners' first defense counsel.[6] He also testified that he had telephoned the apartment recently and was informed by a woman who answered that Larain no longer lived there. During cross-examination, Agent Jorge stated that, although he had been asked by an Assistant United States Attorney whether he knew Larain's whereabouts, he had never been instructed to locate Larain. According to Agent Jorge, the one phone call to the Laguna Gardens apartment constituted his only effort to find Larain (Pet. App. 7a).[7]

The defense called Ronald Siebert, the Special Agent-in-Charge of DEA's San Juan office. Agent Siebert testified that he had last seen Larain three or four months earlier during an accidental encounter in the lobby of the Condado Holiday Inn. Agent Siebert did not attempt to determine where Larain was then living or working. At one point, Agent Siebert testified that Agent Jorge's telephone call to the Laguna Gardens apartment was the only such attempt

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conclusion of the investigations, Larain had relocated in the United States. In addition, the prosecutor gave petitioners copies of two DEA memoranda concerning Larain's moiety claims arising out of this case (Pet. App. 5a-6a).

[6]Both petitioners retained new counsel for the second trial (Pet. App. 4a n.2).

[7]Agent Jorge testified that, while he had not promised Larain that he would never be required to testify, he had told him that the government would avoid depending on him in its cases (Pet. App. 7a).

to locate Larain of which he was aware. Shortly thereafter, however, he testified that Agent Jorge had telephoned Larain's previous address "several times" (Pet. App. 7a-8a).

Following Agent Siebert's testimony, the district court denied petitioners any relief on the ground that they had failed to demonstrate that they had made a diligent attempt to locate Larain on their own (Pet. App. 8a-9a).[8] Defense counsel thereafter conceded that "[t]he defense ha[d] made no efforts whatsoever to look for the government's confidential informant as far as this record is concerned" (*id.* at 9a).

Following a recess, defense counsel made their first request on the record that the government be ordered to produce Larain. They also sought a missing witness instruction. When the court asked the prosecutor if he knew Larain's whereabouts, the prosecutor responded that he did not. The court thereafter ordered the prosecutor to make available to the defense any information that might be useful in locating Larain (Pet. App. 9a). In response to this order, the prosecutor stated that "my agent [will] continue to find out where he is . . . [T]he government is aware of its continuing duty, if they find where he is, to inform counsel for the defense" (Pet. App. 10a).

3. At trial, Agent Jorge's testimony regarding Larain was substantially the same as the testimony he had given at the hearing. When pressed by defense counsel on his efforts to find Larain, however, Agent Jorge stated (Pet. App.

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[8]The court stated (Pet. App. 9a) that defense counsel had not:

> shown any effort that you have made to contact [Larain] and . . . haven't established by any evidence . . . that the government has in any way impeded your effort in trying to find Mr. Larain . . . [T]he evidence before me does not show that the government has any knowledge any more than you do as to where he is now.

At this time, petitioners had not made a specific request for relief as a result of Larain's absence. See Pet. App. 5a n.4.

10a): "I have no need to locate him. Nobody has told me that I have to locate him or even try." Subsequently, the defense announced that it would call Agent Siebert, arguing that it should be permitted to place before the jury evidence that the government had failed to comply with the agreement it had made before the magistrate. The district court ruled that because the defense had known about Larain since before the first trial and had not made any effort to locate him, the government was under no obligation to do so (Pet. App. 11a).

Later that day, the prosecutor announced that an attorney who had just visited his office concerning other matters had seen Larain two weeks earlier at the Condado Holiday Inn. According to the attorney, Larain owned a nightclub in the hotel and was using his own name (Pet. App. 11a).

The defense then called Agent Siebert. Agent Siebert testified that he knew Larain had had a nightly show at the Condado Holiday Inn that he had disbanded within the past six months. He also stated that during their accidental encounter at the hotel previously described, Larain had stated that he was then working at the hotel. Contradicting Agent Jorge's testimony, Agent Siebert stated that about two months earlier he had instructed Agent Jorge to find Larain. Agent Siebert indicated that Agent Jorge had told him that he had telephoned Larain's apartment numerous times and "tried" the Holiday Inn as well. In addition, Agent Siebert stated that Agent Jorge had told him that he had visited Larain's apartment and talked with a guard (Pet. App. 11a-12a).

After Agent Siebert's testimony, the court recessed the trial in order to give the defense an opportunity to find Larain. The next day, defense counsel reported that a person at the desk of the Condado Holiday Inn told them that Larain had managed a nightclub at the hotel. Employees of the hotel suggested that they go to a local restaurant that

Larain frequented. Although Larain did not appear at the restaurant that night, defense counsel were told that he visited it three or four times each week and that he had been there during the previous week. The defense then requested a missing witness instruction, arguing that the ease with which they had been able to locate a place that Larain frequented proved that the government had made no real effort to find the informant. They also argued that Agent Siebert's failure to mention at the hearing that Larain worked at the Holiday Inn indicated that the government had intentionally withheld relevant information (Pet. App. 12a-13a). The court denied the request for a missing witness instruction, stating that, on the evidence before it, the defense itself could have located Larain with "not very much" effort (*id.* at 13a).

The court of appeals held that the government had not made a diligent effort to locate the informant (Pet. App. 16a-17a). The court concluded, however, that petitioners were in no way prejudiced by the government's lack of diligence. Judge Bownes dissented (*id.* at 27a-30a). Although he did not dispute the majority's finding that petitioners were not prejudiced, he concluded that "the Government's conduct was so improper as to require that we dismiss the indictment in the exercise of our supervisory powers" (*id.* at 30a).

ARGUMENT

Petitioners contend (Pet. 11-18) that they are entitled to reversal of their convictions because the government did not make a diligent effort to locate Larain and because it withheld information concerning his whereabouts. The court of appeals agreed with petitioners that the government had an obligation to try to find Larain and that it did not make a diligent effort to do so (Pet. App. 16a-17a). It also agreed that the government's failure to reply promptly

to petitioners' pretrial request concerning Larain's whereabouts and Agent Siebert's failure at the hearing to reveal Larain's business involvement with the Holiday Inn constituted a breach of its duty to provide the defense with all information that might have been helpful in locating Larain (Pet. App. 20a-21a). The court of appeals concluded, however, that reversal of petitioners' convictions was not warranted here because the government's conduct, although not to be condoned, did not prejudice them in any way. This conclusion is correct, and, because it depends heavily on the particular facts of this case, it does not warrant review by this Court.

As the court of appeals explained, the failure of Larain to testify at trial was attributable not only to the government's lack of diligence but also to petitioners' failure to make any serious effort to obtain his testimony. The ease with which defense counsel were able to obtain information leading them to a restaurant frequented by Larain (see Pet. App. 12a-13a) indicated that a diligent effort by petitioners to locate Larain would have been successful despite the government's lack of cooperation. Yet petitioners undertook no such effort. Although petitioner Ariza was a wealthy man, petitioners did not hire an investigator to search for Larain (*id.* at 18a). Nor did they attempt to subpoena him or to obtain a bench warrant requiring the government to secure his presence at trial (*ibid.*). And after they obtained all the information that the government had and quickly located a restaurant that Larain frequented several times each week, petitioners did not seek a continuance to press their search (*id.* at 19a). Instead, they simply renewed their request for a missing witness instruction.

Based on petitioners' failure to undertake efforts consistent with a sincere desire to locate the informant, both courts below justifiably concluded that petitioners' objective "was not to obtain Larain's testimony but to obtain a tactical

advantage at trial and on appeal from his absence" (Pet. App. 18a). Petitioners' failure to make a serious search for Larain, together with the complete absence of evidence that Larain's testimony would have aided their defense, clearly supports the court of appeals' conclusion that petitioners were not prejudiced by the government's conduct. See *United States* v. *Hyatt*, 565 F. 2d 229, 231-232 (2d Cir. 1977). In the absence of any prejudice, there is no basis for reversal or, *a fortiori*, dismissal of the indictment. See, *e.g.*, *United States* v. *Morrison*, No. 79-395 (Jan. 13, 1981), slip op. 4-5 & n.2.

Petitioners' reliance on *Roviaro* v. *United States*, 353 U.S. 53 (1957) (Pet. 14-15), and on several court of appeals decisions (Pet. 12-14), is misplaced. The issue in *Roviaro* was whether the government should be required to disclose to the defendant the *identity* of an informant, not whether it had an obligation to search for him. Here, it is undisputed that at all relevant times petitioners knew Larain's identity. In any event, the court of appeals agreed with petitioners that the government had a duty to try to find Larain, and it noted that under ordinary circumstances the government's failure to do so would have required reversal. The court concluded that reversal was inappropriate here both because petitioners had not shown how Larain's testimony could have helped them and because it was apparent that, with some diligence, petitioners could have produced Larain on their own. In the words of the district court, Larain was " 'just as available to the defense as he [was] to the government' " (Pet. App. 14a). By contrast, in *Roviaro*, it was clear that the defense could not find the informant without the information withheld by the government. Similarly, in none of the court of appeals cases cited by petitioners did it appear that the informant was actually available to the defense and that the defendant's objective, rather than to produce the informant, was to obtain a tactical advantage from his absence. Indeed, in several of these cases, the

defense was unaware of the informant's identity. See, *e.g.*, *United States* v. *Jones*, 492 F. 2d 239, 242 (3d Cir. 1974). Thus, these decisions do not conflict with the holding below that the requirements of fairness would not be served here by "rewarding [petitioners'] tactics with a new trial" (Pet. App. 19a).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

SEPTEMBER 1981

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[9]Citing *United States* v. *Williams*, 496 F. 2d 378 (1st Cir. 1974), and *United States* v. *DeJesus Boria*, 518 F. 2d 368 (1st Cir. 1975), petitioners suggest (Pet. 16-17) that there has been a pattern of government misconduct in the First Circuit relating to the nonproduction of informants. This suggestion is without foundation. In *Williams*, the court expressly held that there was "no error in the failure of the government to do more than it did to locate or produce the informers nor, on this record, can we say it was not diligent." 496 F. 2d at 383. And in *DeJesus Boria*, the court noted that "the Government's conduct does not lead us to infer a deliberate attempt to deprive appellant of useful evidence." 518 F. 2d at 373.

DOJ-1981-09